



An appeal

- by -

Donald Stephen Marlow operating as Donmar HVAC Services  
(“Donmar”)

- 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.:** 2006A/19

**DATE OF DECISION:** March 20, 2006



## FACTS AND ARGUMENT

9. The facts relevant to this appeal are as follows.
10. Donmar is a small, home based business. Mr. Toh worked on call, and was dispatched by Mr. Marlowe as necessary. He had use of the company van for work related purposes.
11. Mr. Toh was to complete an invoice for each job, which was also to serve as his time sheet. Mr. Toh was to have each customer sign the invoice, and, at the end of each week, submit them to Mr. Marlowe. Although Mr. Marlowe contended at the hearing that some of Mr. Toh's worksheets were false, that he failed to complete others, and that many were incomplete, the delegate relied on these invoices to calculate Mr. Toh's wages as they were the best evidence before her.
12. Each pay period, Donmar issued Mr. Toh a computer generated "payroll" statement indicating the dates and hours worked, the rate of pay, and gross amount. Donmar also gave Mr. Toh a document indicating gross pay, statutory deductions and net pay.
13. Mr. Toh quit after he felt he was not getting enough work and because he was unhappy about Mr. Marlowe's position on the use of the company van.
14. The delegate weighed the evidence, much of which was conflicting, particularly on issues relating to Mr. Toh's hours of work, and concluded that Mr. Toh's rate of pay was \$25.00 per hour. She found that, even if Donmar had erred in paying Mr. Toh \$30.00 per hour for the pay period ending August 12, any recovery of this overpayment, or any payments, was prohibited by section 21 of the *Act*.
15. The delegate also concluded that Mr. Toh was entitled to payment for 36.5 hours of work based on the payroll statement prepared by Donmar. She concluded that Donmar had contravened section 17 of the *Act* in failing to pay Mr. Toh all wages earned in the pay period ending August 19 by August 27.
16. The delegate also found Mr. Toh entitled to overtime wages, and Donmar in contravention of section 40 of the *Act* in failing to pay those wages.
17. The delegate further found that Donmar had failed to pay annual vacation pay, and had not shown that as a separate entry on Mr. Toh's wage statement. She found Donmar's practise of including Mr. Toh's vacation pay in his hourly rate of pay to be contrary to the *Act*.
18. Although Mr. Toh had not included the issue of non – payment of statutory holiday pay in his complaint, the delegate found that she had authority to ensure that employees had received their full entitlement under the Act pursuant to section 76(2) of the Act, and concluded that Mr. Toh had not been paid statutory holiday pay for August 1, contravening section 45 of the *Act*.
19. Although Mr. Marlowe checked off all the grounds of appeal on the appeal form, his written submission does not address the statutory grounds of appeal. He has also misstated the second ground of appeal as "evidence has become available that was not available to the defendant prior to the hearing" [my emphasis]. His submission largely focuses on what he alleges are factual errors made by the delegate in the Determination.

20. In his submission, Mr. Marlowe makes the following points:
- he was never given the Complaint Information Form (“CIF”) prior to the hearing;
  - although he received a request for payment from Mr. Toh and the Employment Standards Branch on October 31, 2006, that amount was double the amount on the CIF;
  - He was prepared to settle the complaint for the amount originally sought on the CIF;
  - Mr. Toh was “coerced” by the delegate into adding additional complaint issues;
  - The delegate failed to indicate that Mr. Toh’s hourly wage of \$25.00 included “all benefits including vacation pay and statutory holiday pay and any other benefits” under the *Act*;
  - Mr. Toh was not sure of the hours he was claiming for and could not explain how he arrived at his figures;
  - Mr. Toh’s worksheets were not completed properly and they did not constitute a record of his hours of work;
  - Mr. Toh is dishonest;
  - The delegate’s calculations are inaccurate;
  - While Donmar does not dispute that Mr. Toh worked a number of hours, it could not remunerate him without proper time sheets. Mr. Marlowe says that he could not rely on the accuracy of Mr. Toh’s documents, as he lost trust in him.
21. Donmar sought cancellation of the Determination and an Order that it be allowed to settle the complaint by paying the initial amount claimed in the CIF.
22. The delegate submits that the Determination accurately reflects the evidence before her, and that no error of law has been established.
23. The delegate says that Mr. Marlowe’s submission that Mr. Toh was coerced into adding additional grounds to his complaint is without foundation. She says that Mr. Toh was unaware of his entitlements, and that she raised the issue of statutory holiday pay and annual vacation pay on review of the payroll statements. She indicated that Mr. Marlowe was prepared to argue his position on those issues and did not seek an adjournment at any time.
24. The delegate also says that, although Mr. Toh’s CIF was never given to Mr. Marlowe prior to the hearing, he did participate in a mediation session where all the issues identified in the complaint were discussed. She also notes that Mr. Marlowe was given the opportunity to settle the complaint at all times, right up to the date of the hearing.
25. In reply, Mr. Marlowe acknowledges that the delegate raised issues of overtime, statutory holiday pay and annual vacation pay at the hearing. However, he says he was not prepared to argue his position on these issues. He says he was “ambushed” by the delegate and would have requested an adjournment had he known he was entitled to do so.

## ANALYSIS

26. 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
27. As noted by the Tribunal in *Triple S Transmission Inc.* (BC EST #D141/03), although most lawyers generally understand the fundamental principles underlying the “rules of natural justice” and the other grounds identified under the Act, the grounds for an appeal “are often an opaque mystery to someone who is untrained in the law.” The Tribunal found that appeals should not be “mechanically adjudicate[d]... based solely on the particular “box” that an appellant has – often without a full, or even any, understanding – simply checked off.”
28. Thus, I have considered the appeal submissions in light of the three statutory grounds of appeal.
29. The burden of establishing the grounds for an appeal rests with an Appellant. Donmar must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice.
- Errors of law***
30. Donmar’s submission consists largely of allegations of factual errors made by the delegate.
31. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
32. I have reviewed the record and am satisfied that the conclusions arrived at by the delegate were rationally supported by the evidence. While it is clear that Mr. Marlowe does not agree with those conclusions, an appeal is not an opportunity to re-argue a case that has already been made before the delegate.
33. Furthermore, I note that although Mr. Marlowe suggests that the delegate erred in calculating Mr. Toh’s hours of work, he acknowledged in his appeal submission that he did not keep records of the actual hours Mr. Toh worked. The obligation to maintain payroll records, including hours of work, rests with an employer. The delegate arrived at her conclusion based on the best available evidence, which was Mr. Toh’s records, which were largely supported by Donmar’s payroll documents. Although Mr. Marlowe contends that the delegate erred in her conclusions, he has not provided compelling evidence that she has done so.
34. I dismiss the appeal on this ground.

### *Natural Justice*

35. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker.
36. Mr. Marlowe does not allege that the delegate failed to ensure his right to be heard. He does say however that he did not see Mr. Toh's CIF until the day of the hearing. He also says that the delegate "ambushed" him by raising new issues at the hearing.
37. Mr. Marlowe was given information relating to Mr. Toh's complaint prior to the hearing. This information included the information in the self help kit, and information disclosed at the mediation session. I do not find that Mr. Marlowe was denied the opportunity to know the case he was to meet. He was clearly aware Mr. Toh was seeking unpaid wages.
38. Mr. Marlowe appeared at the hearing, made submissions in response to the complaint, and presumably was given the opportunity to ask questions on the evidence presented.
39. It appears that the delegate, on her own initiative, and, for the first time at the hearing, decided that she would address the issues of overtime, unpaid statutory holiday pay and annual vacation pay. She found her authority to do so under section 76(2) of the Act:
- The director may conduct an investigation to ensure compliance with this *Act* and the regulations, whether or not the director has received a complaint.
40. There is no doubt that the *Act* gives the director the power to conduct investigations whether or not a complaint has been filed. Nevertheless, the practise of the Director in the last couple years has been to conduct hearings rather than investigations (see *Freny* BC EST #D130/04 and *Rivers Mediterranean Grill and Tapas Bar* BC EST #D061/05). I am unable to agree with the delegate's view that she has the ability to conduct an investigation once the hearing has commenced. Where the delegate has elected to hold a quasi-judicial hearing, rules of natural justice must be complied with, including notifying the parties, particularly a respondent, about the issues that have been raised, and giving them full opportunity to respond.
41. There is no dispute that Mr. Marlowe was faced with the necessity to respond to new issues at the hearing. The delegate acknowledges that she raised these issues herself for the first time because Mr. Toh "indicated he was unaware of his entitlements under the *Act*." From my review of the CIF's filed by complainants, Mr. Toh is not unique in this respect. How the Director chooses to ensure that there is compliance with the *Act* is not for the Tribunal to comment upon. Nevertheless, once the delegate elects to hold an oral hearing and issues are raised for the first time at that hearing, parties must be given full opportunity to respond to those issues. Although the delegate says that Mr. Marlowe did not ask for an adjournment when faced with the new issue, Mr. Marlowe says that he was unaware he had a right to do so. Mr. Marlowe is not legally trained, and there is nothing in the hearing information package that tells him of that right. Mr. Marlowe cannot be penalized for failing to ask for something he had no knowledge he had the right to seek. The delegate ought to have explained to Mr. Marlowe that he had the right to ask for an adjournment to address any new issues.

42. As the Tribunal noted in *Freny (supra)*:

The Supreme Court of Canada has repeatedly stated that determining the content of the duty of fairness is a highly contextual exercise. The relevant factors are to be weighed and applied with a view to requiring public bodies to act with courtesy and common sense, in a manner commensurate with the interest at stake, but without imposing unrealistic institutional burdens on the public body: see most recently, *Congregation des temoins de Jehovah v. Lafontaine (Village)*, 2004 SCC 48. It is what the English have concisely referred to as “fair play in action”.

43. Although I find that the delegate conflated the adjudicative and investigative processes which led to some unfairness to Mr. Marlowe, I am unable to conclude, in the context of this hearing, that there was a denial of natural justice.

44. Mr. Marlowe did not dispute the following sentence in the Determination:

I inquired about statutory holiday pay for August 1 and both [parties] agreed that this had also not been paid.

45. In light of the fact that Mr. Marlowe agreed that statutory holiday pay had not been paid, and the records, which he had the obligation to maintain, also did not show that it had, I find no error in the delegate’s conclusion. The same holds for the issue of annual vacation pay. Mr. Marlowe indicated that he had included Mr. Toh’s vacation pay in his hourly rate of pay. Vacation pay must be paid in addition to regular wages, and Mr. Marlowe did not demonstrate to the delegate’s satisfaction that it was paid.

46. The delegate had issued a Demand for Records and it was purely a matter of document review to determine whether the wages had been paid or not. Mr. Marlowe has provided no evidence that the delegate erred in her conclusions on these issues. While Mr. Marlowe ought to have been notified of these issues prior to the hearing, I am not persuaded that, even if he had additional time to respond the delegate’s determination would have been other than it was.

### *New evidence*

47. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- 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 other evidence, have led the Director to a different conclusion on the material issue.

48. Mr. Marlowe has not provided any evidence which meets this test. His complaint is that he did not receive the CIF prior to the hearing. This complaint has been addressed in the context of natural justice, above. With respect to Mr. Marlowe's complaint that he could have settled Mr. Toh's complaint for the sum indicated on the CIF, the fact is that he did participate in a mediation session. The parties did not reach an agreement and the matter proceeded to a hearing. This document does not constitute new evidence as set out above.
49. I find no basis for this ground of appeal.

### **ORDER**

50. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated December 23, 2005, be confirmed in the amount of \$4,060.47, plus whatever interest might have accrued since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**