Employment Standards TRIBUNAL

An appeal

- by -

Enviro Surface Care Ltd.
("Enviro")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2010A/3

DATE OF DECISION: April 7, 2010

DECISION

SUBMISSIONS

Robert Doran	Counsel for Enviro Surface Care Ltd.
Al Ordge	on his own behalf
Karry Kainth	on behalf of the Director of Employment Standards

OVERVIEW

1. Enviro Surface Care Ltd. ("Enviro") appeals, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a determination issued by a delegate of the Director of Employment Standards (the "delegate) on December 2, 2009, under file number ER 155-166 (the "Determination"). By way of the Determination, Enviro was ordered to pay its former employee, Al Ordge ("Ordge"), the sum of $3,239.89 on account of unpaid wages ($2,752.00 in regular wages, $64.00 for statutory holiday pay and $233.95 in vacation pay) and $189.94 in section 88 interest. In addition, and also by way of the Determination, the delegate levied three separate $500 monetary penalties against Enviro (see *Act*, section 98 and section 29 of the *Employment Standards Regulation* – the "*Regulation*") based on its contraventions of sections 17 (semimonthly payment of wages) and 18 (payment of wages following termination of employment) of the *Act* and section 46 (production of employment records) of the *Regulation*. Thus, the total amount payable under the Determination is $4,739.89.

2. Enviro was originally incorporated as "Xtreme Steam (B.C.) Ltd." on October 5, 2004 and the name change to Enviro was effected as of June 3, 2006. According to records maintained by the B.C. Corporate Registry, as of October 8, 2009, Jean Aussant was Enviro's sole director; Jean Aussant (president) and Diane Aussant (secretary) were its only two officers.

3. In his original complaint form filed April 28, 2008, Mr. Ordge asserted that was he employed by Enviro from October 1, 2007, until March 31, 2008. He claimed $24,023 including $20,917 in unpaid wages, $1,040 in vacation pay and $2,066 as compensation for length of service (*Act*, section 63). The delegate, over the objections of Enviro's legal counsel (who repeated requested an oral hearing), conducted an investigation and, as noted above, ultimately found in favour of Mr. Ordge albeit for a sum substantially less than that originally claimed. The Determination (with appended "Reasons for the Determination) was issued on December 2, 2009, some 19 months after the original unpaid wage complaint was filed.

4. In addition to its appeal on the merits, Enviro applied under section 113 of the *Act* to have the Determination suspended pending the adjudication of its appeal. I dealt with that application in reasons for decision issued on March 17, 2010 (see BC EST # D029/10). These reasons for decision address the merits of Enviro's appeal.

5. Enviro does not seek an oral appeal hearing and I am of the view that this appeal can be fairly adjudicated based solely on the parties' written submissions (see *Act*, section 103 and *Administrative Tribunals Act*, section 36). I have before me Enviro's original Appeal Form to which is appended a lengthy submission as well as submissions filed by the delegate (January 26, February 10, and February 26, 2010) and by Mr. Ordge (January 20, February 18, and March 2, 2010). I also have before me the extensive section 112(5) record that was before the delegate.

ISSUES

6. Enviro says that the Determination should be cancelled or, alternatively, varied on the grounds that the delegate erred in law (*Act*, section 112(1)(a)) and failed to observe the principles of natural justice in making the Determination (*Act*, section 112(1)(b)).

7. Enviro's legal counsel alleges five distinct errors of law (Enviro's submission, page 1):

> "a. The [delegate] erred in law in determining that the complainant Mr. Ordge was an employee of [Enviro];
>
> b. The [delegate] erred in determining that [Ordge] was entitled to regular wages of 344 hours at a rate of $8.00 per hour for the sum of $2,752.00;
>
> c. The [delegate] erred in determining that [Ordge] was entitled to receive statutory holiday pay for Easter Friday, March 21, 2008, in the sum of $64.00;
>
> d. The [delegate] erred in determining that [Ordge] was entitled to vacation pay in the sum of $233.95; and
>
> e. The [delegate] erred in assessing administrative penalties against Enviro under sections 17, 18 and 46 of the *Employment Standards Act* and *Regulations* [sic] for a total of $1,500."

8. The particulars regarding the "natural justice" ground are not separately set out under a distinct heading in Enviro's submission but appear to be contained under the "errors of law" heading at pages 2 – 4 of Enviro's submission. There seems to be four central components to Enviro's "breach of natural justice" allegation. First, Enviro says that the delegate should have presided at an oral hearing rather than undertaking an investigation. Second, the extensive delay between the original complaint and the issuance of the Determination (19 months) "was prejudicial and extremely expensive for Enviro to defend". Third, during the course of the investigation, the delegate provided extensive documentation (presumably submitted by Mr. Ordge) that included many irrelevant documents and that, in general, the documents were haphazardly organized; Enviro's legal counsel says he was never clearly advised regarding what particular documents the delegate considered most important so that counsel could formulate a coherent and responsive submission. Fourth, counsel says that during the course of the delegate's investigation, Mr. Ordge continued to expand the ambit of his claim beyond the original complaint and that these "new claims" were statute-barred by reason of section 74 of the *Act*.

EMPLOYEE OR INDEPENDENT CONTRACTOR?

9. Enviro asserts that the *Act* does not apply since Mr. Ordge was, at all times, an independent contract rather an employee. If Enviro is correct in this assertion, the Determination must be cancelled. Since this is a threshold issue, I propose to first address the parties' submissions on this point.

10. The delegate addressed this issue at pages R4 - R17 of his reasons. As is clear from the delegate's reasons, both Mr. Ordge and Enviro agreed that there were two distinct, albeit consecutive, periods of service, namely, from October 1 to December 31, 2007, and from January 1 to March 27, 2008 (although the delegate also found that Mr. Ordge had a short break in his service and did not actually commence work in 2008 until January 8). Mr. Ordge's position was that he was employed by Enviro during both periods in a sales capacity whereas Enviro's position was that Mr. Ordge was employed by another firm, Comad Communications Inc. ("Comad"), from October 1 to December 31, 2007, and worked as an independent contractor providing services to Enviro from January 1 to March 31, 2008.

11. The delegate ultimately concluded that Mr. Ordge was an Enviro employee during both time periods. Both parties agree that Mr. Ordge and Enviro were parties to a "Commission Sales Agreement" ("CSA") that took effect as of January 1, 2008, but was actually executed on January 8, 2008. In the CSA, Mr. Ordge is described as an "Agent" and Enviro is described as the "Principal"; paragraph 14(f) states: "Nothing in this agreement is intended to constitute a partnership or a master and servant relationship between the parties". Despite this latter provision, the delegate concluded that the true relationship between the parties during the currency of the CSA was that of employer/employee.

12. With respect to the relationship between Mr. Ordge, Enviro, and Comad, the delegate determined that Comad (a company that, among other things, provides payroll services) provided payroll services to Enviro and that while Mr. Ordge was nominally recorded on Comad's payroll, this was purely an administrative arrangement between Enviro and Comad. Although Mr. Ordge received payroll cheques from Comad, these sums were invoiced back to his "true employer", Enviro.

13. The delegate determined, at page R28 of his reasons, "that Mr. Ordge has been paid all of his regular wages and hours or work from October 2007 to December 31, 2007". Perhaps because of this finding, counsel for Enviro has not challenged the delegate's finding that Mr. Ordge was an Enviro employee during the period from October to December 2007. However, Enviro asserts that Mr. Ordge was an "independent contractor" during the period from January 1 to March 31, 2008. Counsel for Enviro seemingly relies exclusively on the terms of the CSA in asserting that there was no employment relationship. In particular, counsel says:

- "[the delegate] fail[ed] to appropriately examine the written [CSA] and analyse its contents";
- the delegate "totally ignored" the CSA terms and conditions;
- the CSA simply granted Mr. Ordge the right to sell products (for which he would be exclusively paid a commission based on sales) within B.C. for a period of 3 months (unless extended by mutual consent);
- Mr. Ordge was not obliged to provide exclusive services to Enviro and could sell "non-competing" products; and
- "the parties did not intend for there to be an employer and an employee situation"

(Enviro's submission, page 5)

14. The law is clear that an agreement that defines the parties' relationship to be something other than an employment relationship is of limited assistance in determining the parties' true relationship. The delegate quite rightly focussed on the substance of the parties' relationship rather than its superficial form.

15. An employee can be compensated on the basis of commissions (see *Act*, section 1 definition of "wages") and thus the method of payment does not determine one's status. Further, the fact that a relationship is for a limited term (say, as short as three months) does not determine whether or not the parties are in an employment relationship. The CSA limited Mr. Ordge's ability to work for a firm that was in direct competition with Enviro and required him to maintain Enviro's trade secrets. However, these obligations are generally considered to form part of most employees' basic duties of loyalty and faithful service (see, e.g., *McMahon v. TCG International Inc.*, 2007 BCSC 1003 and the other authorities cited therein).

16. In the course of his reasons, the delegate noted that Enviro provided a lease vehicle for Mr. Ordge's use as well as a camera and laptop computer. Mr. Ordge worked out of Enviro's Coquitlam office. Ms. Fei Wang, a bookkeeper employed by Comad, confirmed that "on paper, Mr. Ordge was Comad's employee, however, in reality and through the performance of tasks he was Enviro's employee as he was performing duties for Mr. Aussant and Enviro"; Ms. Wang stated that Comad's payroll system was utilized to process Mr. Ordge's pay

since "Mr. Aussant's/Enviro's payroll was never functioning" (Source: Note of delegate's August 11th telephone interview with Ms. Wang). The delegate also had before him various documents (all in the record before me) from which it could reasonably be concluded that the parties were in an employment relationship during 2008 including:

- several e-mails and letters evidencing Mr. Aussant giving direction to, and otherwise exercising control over, Mr. Ordge in the manner in which he was to carry out his duties relating to Enviro.
- Enviro's termination letter, dated March 27, 2008, states that the CSA is being "terminated effective immediately" and that Mr. Ordge is to "return the Company Vehicle, Chevron Fuel Credit Card, HP Laptop and Song Digital Camera, immediately, your Health Plan will be covered by Enviro Surface Care until March 31st, 2008". This letter evidences some of the classic indicia of an employment relationship, namely, ownership of tools and equipment by the employer.
- Several Enviro "expense reimbursement vouchers" submitted by Mr. Ordge to Enviro for such things as meals, fuel and vehicle maintenance, and vehicle mileage claims.
- a copy of Mr. Ordge's "Enviro" business card. The business address noted on the card is Enviro's business address and Mr. Ordge's e-mail address is shown as "jda@envirosurfacecare.ca". Clearly, Mr. Ordge was being "held out" as an Enviro employee.
- several invoices from Comad to Enviro relating to reimbursement for Mr. Ordge's wages and other employment related expenses (e.g., cellular telephone charges).

17. Whether one is an employee under the *Act* is a question of mixed fact and law. The *Act* provides extensive, though not exhaustive, definitions of both "employee" and "employer". The delegate received detailed submissions and documentation from both Enviro and Mr. Ordge and then turned his mind to whether the parties' relationship could be said to fall within the scope of the *Act*. In my judgment, there was sufficient evidence before the delegate that would allow him to reasonably conclude that there was an employment relationship between the parties and I am unable to conclude, based on the material before me, that the delegate erred in his determination in this regard. I might also add that Enviro has not submitted any new evidence or arguments that would persuade me that the delegate's determination on this point was incorrect. Accordingly, I propose to confirm the delegate's Determination as it relates to this particular matter.

18. At this juncture, I wish to address Enviro's "natural justice" assertions.

THE "NATURAL JUSTICE" ALLEGATIONS

19. As noted above, Enviro's "natural justice" allegations are essentially fourfold: delay in issuing the Determination following the original complaint, concerns about document disclosure, the addition of new claims as the investigative process continued, and the delegate's failure to order an oral complaint hearing. I shall deal with each matter in turn.

20. There was a lengthy delay in issuing the Determination following the initial complaint (about 19 months). This sort of lengthy delay is not to be encouraged. More troubling, the delegate has not provided any sort of explanation in his submission regarding why this complaint took over a year and a half to investigate. On the other hand, while Enviro says that this delay was "prejudicial", it has not provided any particulars about the precise nature of the prejudice it suffered solely by reason of this lengthy delay. It appears that at least some

of the delay is attributable to Enviro's various requests for time extensions to file submissions with the delegate.

21. In light of the Tribunal's decisions in *0788104 B.C. Ltd. d.b.a. "The Local Kitchen"* (BC EST # D001/10) and *Atkinson* (BC EST # D113/09), and in the absence of specific evidence of prejudice uniquely attributable to the delay, I am not prepared to find a contravention of the principles of natural justice based solely on the fact that the investigation was not completed until about 19 months after the original complaint was filed.

22. I have reviewed the section 112(5) record and, having done so, it appears that the delegate made a careful and timely effort to forward each and every submission that was received from one party to the other. While the delegate did not re-organize the material that was being forwarded or provide guidance as to what documents he thought were, or were not, relevant, I do not believe that the delegate has any such obligation. First, if the delegate had re-organized the material or separated relevant from irrelevant documents, I query whether the delegate would then have been criticized for unfairly assisting a party in presenting their case. Second, counsel for Enviro was certainly within his rights to make submissions about the relevance (or irrelevance) of documents submitted by Mr. Ordge and I do not believe it would have been appropriate for the delegate to make a "pre-emptive strike" in that regard. I should note, however, that the delegate did – on many occasions – advise the parties about the governing legal principles, the relevant statutory provisions and the nature of the evidence that he would generally wish the parties to provide. In my judgment, the delegate went about as far as he could in assisting the parties in preparing their submissions without "descending into the arena".

23. I do not find any merit in the suggestion that the delegate breached the principles of natural justice in the manner in which the parties' documents and submissions were disclosed to each other during the course of his investigation.

24. The record before me indicates that Mr. Ordge did expand his claim during the course of the delegate's investigation. On the other hand, Enviro was given an opportunity to respond to each new claim advanced by Mr. Ordge and, ultimately, these "new" claims were determined in Enviro's favour.

25. According to its counsel, "Enviro made continuous requests from and after July 15, 2008 for an oral hearing but was denied by [the delegate]." In his submission, Enviro's legal counsel referred to four separate letters (July 15, November 12, December 15, 2008 and August 20, 2009) in which he sought to have Mr. Ordge's complaint adjudicated by way of an oral hearing. In his July 15 letter, counsel asserted that one of the documents submitted by Mr. Ordge was "fraudulent" and that "the company believes that Mr. Ordge must be subjected to cross-examination by counsel for the company in order to reach the truth in this matter." There is a continuing theme throughout counsel's correspondence that there were serious credibility issues that could only be addressed through the crucible of a trial-like process. I might also add that, in addition to yet again applying for an oral hearing, in his August 20, 2009 letter, counsel submitted that the oral hearing should proceed before a new delegate.

26. By way of reply to the issue concerning whether there should have been an oral hearing, the delegate, in his submission dated February 10, 2010, says:

- "I respectfully submit that the manner in which this investigation was handled by the Director was not in breach of the principles of natural justice. The investigation did not proceed in an unfair manner, or with prejudice, or bias, and there was no reason for the appointment of another delegate to adjudicate this file, or for it to proceed to an oral hearing."
- "Concerns around credibility were considered and addressed appropriately in the Determination."

- "The Director considered Enviro's request for an oral hearing but decided that it was best to proceed with this complaint via investigation, specifically through written submissions and investigative interviews that the Director conducted via telephone. The issues of credibility were considered and the Director made the appropriate findings as set out in Determination."

27. A party is not absolutely entitled to an oral hearing before the Director or his delegate although the *Act* does envision such a process (see, *e.g.*, section 84.1). Whether or not Enviro preferred to have an oral hearing is not the issue before me; rather, I must decide whether the delegate's decision to refuse to allow the complaint to proceed to an oral hearing amounted, in this case, to a breach of the rules of natural justice. Enviro's legal counsel repeatedly asked for an oral hearing and was, each time, rebuffed. The delegate now says that an oral hearing was unnecessary but does not specifically state why an investigative procedure was preferable to an oral hearing. The delegate appears to acknowledge that there was a credibility issue but says that it was "appropriately addressed in the Determination".

28. Enviro's legal counsel's July 15, 2008, letter clearly placed Mr. Ordge's credibility in issue inasmuch as it was alleged he forged a document. The delegate replied by letter dated August 5, 2008, but did not, in that letter, address in any fashion whatsoever counsel's request for an oral hearing. On September 10, 2008, counsel for Enviro submitted an expert's report, dated August 21, 2008, corroborating the "forgery" allegation. The delegate wrote to Enviro's legal counsel on September 23, October 20, and November 5, 2008, but, once again, did not address the request for an oral hearing. The delegate's November 5 letter is problematic in that it clearly reflects a decision by the delegate not to hold an oral hearing even though the delegate, to this point, never addressed counsel's request for an oral hearing. In effect, a decision not to hold an oral hearing was taken without ever providing any sort of explanation as to why an oral hearing would not be held – Enviro's application for an oral hearing was essentially ignored and the delegate simply announced that he was proceeding down the investigatory path.

29. On November 12, 2008, and in reply to the delegate's November 5 letter, Enviro's legal counsel reiterated his application for an oral hearing. By letter dated November 14, 2008, the delegate finally provided at least some sort of response to Enviro's application for an oral hearing. The delegate's entire response on this point is reproduced below:

> With regards to your request for an oral hearing, please note that at the onset of this investigation a decision was made to investigate this complaint via written submissions. At this time, the decision to continue to investigate via written submissions is confirmed as there are no compelling reasons to proceed via an oral hearing. If you have certain questions you would like to pose to the complainant, I encourage you by all means to pass them on to me and I myself can present the complainant with your questions and request a response in turn.

30. In my view, the delegate's November 17 response is somewhat disingenuous. The delegate appears to be saying that he made a unilateral decision shortly after the original complaint was filed (on April 28, 2008) to investigate the complaint and was simply unprepared to revisit that decision. The delegate's suggestion that he could question the complainant on counsel's behalf (outside counsel's presence and with no opportunity for counsel to ask follow-up questions and, quite likely, with no opportunity for the delegate to assess the complainant's demeanour since these questions would not be asked in a face to face forum) falls well short of being an adequate substitute for cross-examination in an oral hearing. I might add that if an oral hearing had been scheduled when first requested (in July 2008), this entire matter might have been concluded by November 2008 – as it was, the delegate did not issue the Determination and his reasons until over one year later, on December 2, 2009.

31. In any event, on November 17, 2008, counsel for Enviro faxed a letter to the delegate setting out his reasons why an oral hearing should be held including: there were issues of credibility that demanded *viva voce* direct evidence coupled with cross-examination; there were issues concerning the relevance and/or admissibility of many of the documents submitted; and the existing submissions consisted largely of hearsay statements. I have reviewed the documentary record that was before the delegate and, having done so, find that there was at least some presumptive validity to each of the assertions that was advanced by Enviro's legal counsel. Indeed, in his February 10, 2010, submission to the Tribunal, the delegate appears to acknowledge that several documents were not relevant and that there were credibility issues to be determined.

32. On November 27, 2008, the delegate responded to Enviro's counsel's November 17 letter. In this letter the delegate reproduced, in full, section 76 of the *Act* (the provision dealing with investigations) and then continued:

> It was decided at the onset of this matter that it would be dealt with through an investigation, specifically via written submissions where both parties are given an opportunity to respond, as this does not breach the principle of *audi alteram partem*. I am still of the view that this is the manner in which the remainder of this investigation will be conducted. Furthermore, the issue of witness credibility may not even be a factor in the determination of this matter because the evidence may be deemed irrelevant.
>
> Issues of credibility, hearsay evidence and relevance of evidence presented can be dealt with through an investigation. I am not convinced that the only way to resolve this matter fairly will be through an oral hearing. Both parties are being given full disclosure of all the information and evidence provided by each party and reasonable time to respond, therefore ensuring there is no contravention of section 77 of the Act [Note: the "opportunity to respond" provision] by proceeding through an investigation.

33. As noted above, counsel for Enviro continued to press for an oral hearing (by letters dated December 15 and 18, 2008, and August 20, 2009) but to no avail. Ultimately, the delegate did have to make findings regarding the relevance and probative value of certain documents and also had to make certain credibility findings. Regarding the latter, the delegate was cognizant that, for example, one of Mr. Ordge's key witnesses was a self-described "friend" of Mr. Ordge and that this person was also involved in civil litigation against Mr. Aussant. At some points in his reasons, the delegate appears to find Mr. Ordge to be credible and at other times he rejects his evidence. While I do not wish to be taken as suggesting that an oral complaint hearing must inevitably be held where credibility issues arise, in this case, these issues were at the centre of the dispute between the parties and colour every issue that was before the delegate for determination. It bears recalling that Mr. Ordge initially claimed over $24,000 in unpaid wages but was ultimately awarded only a little over 13% of his initial claim – a finding, incidentally, that Mr. Ordge also considers to be "unfair" (January 20, 2010 submission). Although the delegate never had the benefit of any party or witness's evidence being tested in an oral hearing through cross-examination, he nonetheless concluded "that I have gained considerable insight into these individuals' credibility throughout the course of this entire investigation" (page R38).

34. In my judgment, the reasons given by the delegate for refusing to conduct an oral complaint hearing do not pass muster. Although it is true that Enviro was represented by legal counsel, Mr. Ordge describes himself as a former vice-president with a Canadian chartered bank and a former senior municipal official and thus I do not believe that he would have been placed in a wholly unfair situation had he represented himself at an oral hearing. Mr. Ordge challenged Enviro's witnesses' credibility with at least as much vigour (if not more) as Enviro challenged his. As a result of the manner in which this investigation was conducted, neither party was given any real opportunity to "challenge their accuser" and to test their evidence in an open face-to-face hearing. I am of the view that in the unique circumstances of this case, the delegate's refusal to permit this complaint to be adjudicated following an oral complaint hearing amounted to a contravention of the principles of natural justice that adversely affected *both* parties' ability to present their case and effectively respond to the other party's case.

35. Having reached this conclusion, I see no need to address the other issues relating to the determination and calculation of Mr. Ordge's unpaid wage claim. The entire question of Mr. Ordge's entitlements under the *Act*, if any, shall be considered anew in a rehearing.

ORDER

36. Pursuant to section 115(1)(a) of the *Act*, the Determination is confirmed insofar as it relates to Mr. Ordge's status as an "employee" (and Enviro's status as an "employer") under the *Act* during the period from October 1, 2007, to March 31, 2008. Pursuant to section 115(1)(b) of the *Act*, the matters of Mr. Ordge's entitlement to unpaid wages and any other *Act* entitlements, if any, earned during this latter period, and whether any section 98 penalties should be assessed, are referred back to the Director to be determined following an oral complaint hearing.

37. In light of the fact that the delegate has already made certain credibility findings, I do not think it appropriate for him to preside at the oral complaint hearing (see *Old Dutch Foods Ltd.*, BC EST # RD115/09) and, accordingly, I am ordering that the matter of Mr. Ordge's *Act* entitlements, if any, be referred back to the Director for an oral hearing before a different delegate.

38. My March 17, 2010, order with respect to the suspension of the Determination shall remain in effect pending the final adjudication of this matter unless otherwise varied or cancelled by a Tribunal order.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal