

An appeal

- by -

Mariusz Matejko
("Mr. Matejko")

- 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.: 2008A/18

DATE OF DECISION: April 15, 2008

DECISION

OVERVIEW

1. This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") brought by Mariusz Matejko ("Mr. Matejko") of a determination that was issued on January 17, 2008 (the "Determination") by a delegate (the "Delegate") of the Director of Employment Standards (the "Director").
2. By way of background, Mr. Matejko filed a complaint under Section 74 of the Act (the "Complaint") alleging that Jeffrey Alan Pasechnik carrying on business as Zone Construction ("Mr. Pasechnik" or "Zone Construction") contravened the Act by failing to pay him regular wages.
3. The Delegate held a hearing of the Complaint on December 6, 2007 (the "Hearing") and decided, pursuant to Section 76 of the Act, that there was not sufficient evidence to prove Mr. Matejko's Complaint and therefore no further action would be taken regarding the Complaint.
4. In the Appeal Form, Mr. Matejko is appealing the Determination on the sole ground that evidence has become available that was not available at the time the Determination was being made. However, in the Final Reply submissions, he alleges bias on the part of the Delegate or the Director, which appropriately would come under the "natural justice" ground of appeal under Section 112(1)(b) of the Act.
5. Mr. Matejko, by way of a remedy, is seeking the Tribunal to refer the matter back to the Director.
6. Mr. Matejko is not seeking an oral hearing and in my opinion, Mr. Matejko's appeal can be properly adjudicated on the written submissions of the parties without resort to an oral hearing. Accordingly, this appeal will be decided based on the written submissions of the parties, the Section 112 (5) "Record" and the Reasons for the Determination.

ISSUES

7. The issues to be determined in this appeal are two-fold:
 - (i) Is there 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 returning the matter to the Director?
 - (ii) Was the Delegate or the Director therefore failed to observe the principles of natural justice in making the Determination?

FACTS AND ARGUMENT

8. In the Determination, the Delegate notes the parties do not dispute having an employment relationship at some point in the past when Mr. Matejko performed work for Zone Construction as a general contractor at the rate of pay of \$25.00 per hour. However, beyond this agreement on the

facts, everything else appears to be in dispute between the parties. In particular, Zone Construction categorically refutes Mr. Matejko's claim that during the period January 2, 2007 to March 30, 2007, he worked eight hours a day, five days a week at the rate of pay of \$25.00 per hour and that Zone Construction owes him wages for 348 hours for a grand total of \$8,700.00.

9. At the Hearing, Mr. Pasechnik, the principal of Zone Construction, testified that while Mr. Matejko contacted him in or about January 2007 asking for work, he did not have any work to offer him and therefore did not hire him. Moreover, Mr. Pasechnik stated that Zone Construction ceased operating and dissolved in August 2006 and the Complaint is a complete fabrication on Mr. Matejko's part.
10. Mr. Matejko, on his part, explained that he knew Mr. Pasechnik for approximately three years and worked on and off for Mr. Pasechnik throughout this entire period. In support of his position, Mr. Matejko produced, at the Hearing, the statements of earnings he received from Zone Construction for the period June 1, 2006 to June 15, 2006. He further stated that he worked for Zone Construction from January to March 2007 but was never paid by Mr. Pasechnik or Zone Construction despite Mr. Pasechnik's continuous promises to pay him throughout this period. In support of his claim, Mr. Matejko indicated that he had a witness by the name of John from Advanced Quality Exteriors who was on the job site in New Westminster where he worked for Zone Construction during the period in question. According to Mr. Matejko, John could support or corroborate his claim.
11. The Delegate noted that Mr. Matejko did not give any advance notice of his intention to call John as a witness, however, Mr. Pasechnik did not object to Mr. Matejko attempting to contact the witness during the Hearing and again before its conclusion with a view to having him attend at the Hearing to give evidence. However, Mr. Matejko was unsuccessful in contacting John both times. When asked by the Delegate when he last spoke with John, Mr. Matejko indicated that it was approximately three weeks prior to the Hearing.
12. Mr. Matejko further testified at the Hearing that he first met with Mr. Pasechnik in 2003 when he noticed on the Internet a job advertisement for workers who could install siding. He subsequently ended up working for Mr. Pasechnik for about eight months in 2003 and the employment relationship ended when he quit to go work elsewhere. The Delegate noted that later in the Hearing, Mr. Matejko changed or amended his testimony to indicate that he could not remember whether the first year he worked for Mr. Pasechnik was 2003 or 2004. Mr. Matejko also testified that in the summer of 2006 he was unemployed and so he telephoned Mr. Pasechnik and asked him if he could give him some work and Mr. Pasechnik agreed. Mr. Matejko then worked for Mr. Pasechnik during the month of June 2006. At the end of the month on June 30, 2006, Mr. Matejko quit his employment with Mr. Pasechnik apparently because he was not happy because certain materials were insufficient for the job that he was performing. Mr. Matejko then started looking for a new job.
13. On January 1, 2007, Mr. Matejko states that he telephoned Mr. Pasechnik looking for work and Mr. Pasechnik said that he had a "big job site" and so he started working for Mr. Pasechnik again. Apparently, the job site was in New Westminster. Mr. Matejko says that he worked continuously on the job site installing siding until March 30, 2007. He further indicates that Mr. Pasechnik promised to pay him wages every week during his period of employment but no payment was forthcoming. As a result he quit his employment with Mr. Pasechnik. Thereafter, he states he made numerous telephone calls to Mr. Pasechnik to obtain payment but to no avail.

14. The Delegate, at the hearing, asked Mr. Matejko whom he worked with on the job site. Mr. Matejko responded that he worked with Mr. Pasechnik and “one young guy” whose name he could not remember. Mr. Matejko, however, indicated that there were some other workers on the job site including John whom he intended to call at the hearing.
15. On the part of Zone Construction, Mr. Pasechnik indicated that Mr. Matejko worked for him or Zone Construction in the summer of 2006 but that he never hired Mr. Matejko thereafter in 2007. Mr. Pasechnik also indicated that when he operated Zone Construction, Mr. Matejko would come to him asking for work from time to time and he gave work to Mr. Matejko on a sporadic basis. Mr. Pasechnik further stated that while Mr. Matejko has not worked for him since the summer of 2006, the last time he spoke with Mr. Matejko was in January 2007 when Mr. Matejko contacted him to borrow some money. Mr. Pasechnik also indicates that Mr. Matejko subsequently telephoned him several times seeking money from him while intoxicated.
16. Mr. Pasechnik also indicated at the Hearing that in addition to there not being any work to give to Mr. Matejko in 2007, his company, Zone Construction, was dissolved in August 2006 and he was out of the construction business and only picked up *ad hoc* work. He indicated that in January 2007, he was working on setting up an importing Internet company and doing some waterproofing work in the New Westminster area. He heard of the job in the New Westminster area by attending at the job site in person and asking for work and only worked on the job site for five days. He indicates that Mr. Matejko was not present at the job site while he was working.
17. Mr. Pasechnik further indicated that Mr. Matejko has a reputation in the construction industry for seeking sporadic work on his own terms and leaving when something better materializes.
18. The Delegate indicates that during the hearing she asked both parties if they had any relevant supporting documents in their possession including any current or past T4 slips or Records of Employment, payroll documents and the like but neither party was able to produce any further documents mainly because no other documents existed. The Delegate also noted that Mr. Matejko kept no records whatsoever of his work hours during the period of his claim.
19. The Delegate, in making the Determination, relied upon Section 76(3)(e) of the Act and concluded that in the absence of further evidence she was unable to conclude, on a balance of probabilities, that there was an employment relationship between Mr. Matejko and Mr. Pasechnik or Zone Construction during the period in question. The Delegate reasoned:

The only probative evidence either party presented was their verbal recollection of events based on memory. The only documentary evidence before me is the Complaint Form, a 2006 wage statement and the historical corporate search for Zone Construction. I accept that if I found an employment relationship existed between the parties from January to March 2007, then Matejko’s 2006 wage statement would act as some evidence of the agreed upon rate of pay. However, given that it is not disputed that the parties have a past working relationship, this wage statement does not assist in proving a threshold issue as to the existence of an employment relationship during the relevant time. Alternatively, the corporate search does confirm Pasechnik’s statement that the company was dissolved in August 2006. I have no evidence upon which to conclude that Pasechnik continued to operate the business as a sole proprietor or otherwise.

Upon a review of the extremely limited argument and evidence submitted by the parties, it is my determination that, on a balance of probabilities, Matejko has not met that burden. In short, I am

unable and unwilling to impose approximately \$8,700.00 in wage liability plus administrative penalties, on an individual based only on vague assertions.

20. The Delegate added that the conclusion she arrived at in her Determination was also based on her analysis of credibility of the evidence submitted by the parties. In particular, the Delegate stated:

...I recognize that Matejko and Pasechnik have diametrically opposed evidence with respect to the complaint. There is no agreement on the material facts and limited relevant documentary evidence. Hence, I arrived at the above finding with respect to the evidence by analyzing and weighing the credibility of the evidence submitted.

21. The Delegate then referenced the notable and oft quoted decision of *Faryna v. Chorny* for guidance on assessing credibility of witnesses in cases of conflict of evidence:

...[I]n assessing credibility, one factor to consider includes the manner of witnesses (for example, if the witnesses are clear, forthright and convincing or evasive and uncertain). However, of greater significance is the witnesses' ability to recall details; the consistency of what is said; the reasonableness of the story; the presence or absence of bias, interest or other motives; and the capacity to know... Thus, the essential task which I am faced with is to decide what is most likely to be the truth given the circumstances.

Applying these principles, while I did not find Pasechnik's testimony to be extremely detailed, Matejko's evidence further lacked these hallmarks of credibility. Matejko stated that he worked regular hours for approximately three months for Pasechnik without any remuneration and solely on the promise of future payment. Conversely, Pasechnik responded that Matejko's entire claim is premised upon their prior sporadic working relationship, Matejko's work history and Matejko's need for funds. Finally, Matejko acknowledged that he did not keep any contemporaneous calendar, diary or other form of record with respect to his hours of work or work activities. While this alone would not be fatal to his claim, when combined with his own limited recollection of events, in my view, it further serves to impair the strength of his claim.

22. Accordingly, the Delegate concluded that there simply was not enough evidence to prove Mr. Matejko's claim based on a balance of probabilities.

23. Mr. Matejko, in his appeal submissions, attaches a single page of hand-written submissions, which, because of its brevity, I am producing verbatim below:

I was working for Zone Construction (Jeff Pasechnik) for a time of three months and I was not compensated for my work. I filed complaint against Jeff Pasechnik and I was notified that I did not provide sufficient proof. I was very offended by this decision due to the fact that I have witnesses that will agree that I did indeed work for Zone Constr. for three months. These witnesses will also agree to the fact that the above stated gentleman would drive me to and from work because I could not afford a car at the time. I believe that this is very wrong and unjust to perform work for three months (started 1 January 2007 to 30 March 2007) and not to be compensated for my work. That is why I am appealing this claim and I am very thankful for another opportunity to voice my side of case [sic].

List of my witnesses:

Zbigniew Sindrewicz Tel. 604-603-1726
John (Advance Quality Exter) 604-786-0874
Janusz Wilk 604-779-8075

24. In response to Mr. Matejko's appeal, the Director submits that Mr. Matejko's appeal fails to satisfy the test for admitting new or fresh evidence on appeal. The Director further argues that Mr. Matejko's appeal is essentially based on the argument that he either now possesses or can obtain additional evidence to support his initial position that the parties were in an employment relationship during the period of his claim. The Director notes that prior to the involvement of the Delegate who made the Determination, there was another delegate (the "Original Delegate") of the Director who was involved with Mr. Matejko's complaint and he, on November 7, 2007, sent Mr. Matejko a letter (the "November 7 Letter") to educate him about the hearing process and what he would need to produce at the Hearing. The letter starts with an important direction to Mr. Matejko:

You filed a complaint with very little information being provided. For purposes of our hearing you will need to provide all the evidence that you can gather and that you have to support your complaint allegation.... Please provide as much of the information as you have to our office Friday, November 16, 2007 or sooner. [sic]

25. Further, the Original Delegate, prior to the November 7 Letter, in a letter dated October 17, 2007 (the "October 17 Letter") to both parties, directed the parties to "identify all person(s) intended to be brought as witness(es) and (to) provide a brief summary of the general evidence that will be presented by each". The same letter also enclosed a Fact Sheet for Adjudication Hearings (the "Fact Sheet") that repeated that same instruction and asked both parties to provide, by Thursday, November 16, 2007 "a list of who will be attending the hearing" and to "describe the role of those individuals in respect to the complaint". However, according to the Director, Mr. Matejko neither mentioned any additional evidence beyond what is set out in the Determination nor requested an adjournment to produce his witnesses. In the circumstances, the Director submits that there is nothing in Mr. Matejko's appeal submission, which supports his argument that evidence has now become available that was not available at the time the Determination was being made. The Director further argues that Mr. Matejko is simply trying to have a re-hearing of his Complaint with a view to achieving a different conclusion or decision than that made in the Determination. Therefore, Mr. Matejko's appeal should be dismissed.
26. Mr. Matejko, in his Final Reply, in response to the Director's appeal submissions, reiterates that he has three witnesses that can verify his claim. He further alleges that the Tribunal or the Employment Standards Branch is biased against Polish people like himself and gives an example in support of this assertion the case of a Polish gentleman who died at the Vancouver International Airport after the police used a Tazer gun on him (the "Tazer Incident"). He also, in his final submissions, threatens to reveal to the television media, the ill treatment that he is receiving with respect to the Complaint.

ANALYSIS

27. In *Re Merilus Technologies Inc.*, BC EST # D171/03 the Tribunal set out four conjunctive requirements 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.

28. In this case, Mr. Matejko admits that he was informed, after filing the Complaint, that he had not provided sufficient information: “*I filed complaint against Jeff Pasechnik and I was notified that I did not provide sufficient proof [sic]*”. While I am not certain if Mr. Matejko, in the latter submission, is referring to the Delegate’s Determination or the Original Delegate’s November 7 Letter (which he received well in advance of the Hearing) indicating that he had filed the Complaint with very little information and he should provide all evidence supporting his allegations, I am amply satisfied that the Original Delegate gave Mr. Matejko sufficient instruction to prepare his case and produce all necessary evidence in support of his claim including any witnesses at the Hearing. More specifically, the Original Delegate gave Mr. Matejko sufficient information in the October 17 Letter and the accompanying Fact Sheet to understand that he needed to identify his witnesses and provide a brief summary of their general evidence by November 16, 2007, well in advance of the Hearing date. The October 17 Letter was subsequently supplemented with the November 7 Letter of the Original Delegate to Mr. Matejko advising him (if not outright warning him) that the evidence he had so far produced in the Complaint was “very little” and he should bring all evidence in support of his allegation in the Complaint at the Hearing. Despite the October 17 Letter and the November 7 Letter, Mr. Matejko did not add much further to his Complaint before the Hearing and most certainly did not give notice to the Delegate or Mr. Pasechnik of any witnesses he intended to call and the evidence they would give.
29. I also do not find any explanation in Mr. Matejko’s appeal submissions as to why he did not disclose any of his three witnesses to the Delegate and Mr. Pasechnik in advance of the Hearing. Further, while at the Hearing Mr. Matejko referred to a fellow by the name of John who could corroborate that he worked at the New Westminster job site for Mr. Pasechnik, he did not explain what efforts, if any, he made to have John attend to testify at the Hearing or to contact John to obtain his evidence in advance of the Determination being made. In the case of the two other witnesses Mr. Matejko claims could corroborate his story, Messrs. Janusz Wik and Zbigniew Sindrewicz, Mr. Matejko did not refer to them at the Hearing. Both these witnesses are mentioned for the first time in the appeal submissions of Mr. Matejko without any explanation why he did not call them to testify at the Hearing or what, if any, efforts he made to have them attend at the Hearing.
30. While the evidence Mr. Matejko alleges all three of his witnesses could provide is relevant and arguably of high probative value, I am not satisfied that the evidence of these witnesses could not, with the exercise of due diligence on Mr. Matejko’s part, have been discovered and presented to the Delegate or the Director during the investigation or adjudication of the Complaint and prior to the Determination being made. This, in my view, is fatal to Mr. Matejko’s appeal.
31. I also add that Mr. Matejko cannot split his case by presenting part of it to the Delegate at the Hearing and then, depending on the outcome of the Determination, present the rest of it during the appeal. The Tribunal has stated repeatedly in cases that an appeal is very limited in nature and not a fresh rehearing of a complaint. It is imperative that parties heed to this instruction and make certain that they present to the Delegate all relevant evidence that is, with the exercise of due diligence, available to them during the investigation or adjudication stages of the complaint.

32. I also wish to point out that allowing Mr. Matejko to split his case and adduce evidence on appeal that arguably was available during the investigation or adjudication stages of the Complaint but not produced, is inconsistent with one of the essential purposes of the Act, namely, to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act set out in Section 2(d). Therefore, I dismiss Mr. Matejko's "new evidence" ground of appeal.
33. Finally, Mr. Matejko, in his Final Reply, has made an assertion of bias on the part of the Director or the Tribunal because he is Polish. While I question the propriety of Mr. Matejko's Final Reply as it is not at all responsive to the submissions of the Director and raises a completely new allegation for the first time which properly should have been raised in the Appeal Form under the "natural justice" ground of appeal in Section 112(1)(b), I propose to deal with it because of its seriousness. Upon my review of Mr. Matejko's allegation of bias, I can say unequivocally that it is without any foundation. All Mr. Matejko has done in support of this allegation is to refer to the Tazer Incident at the Vancouver International Airport involving a Polish gentleman with a view to suggesting that Polish people are mistreated and the Delegate or the Director has mistreated him therefore in dismissing the Complaint in the Determination. In my view the Tazer Incident is completely irrelevant to Mr. Matejko's case and does not assist him in relation to his allegation of bias. I also add that Mr. Matejko and parties who wish to allege bias on the part of the adjudicator should be mindful that such an allegation is a serious assault on the integrity of an adjudicator and should not be made speculatively (*Cyberbc.Com AD & Host Services Inc. (c.o.b. 108 Tempo and La Pizzaria) [2002] B.C.E.S.T.D. No. 344*). As indicated by Mr. Justice Gibbs in *Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.):

An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause.

34. I, therefore, dismiss Mr. Matejko's appeal.

ORDER

35. Pursuant to Section 115(a) of the Act, I order that the Determination be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal