

An appeal

- by -

7217081 Canada Ltd. carrying on business as Concrete Image
(“Concrete Image”)

- 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.: 2012A/26

DATE OF DECISION: May 1, 2012

DECISION

SUBMISSIONS

Stafford King	on behalf of 7217081 Canada Ltd. carrying on business as Concrete Image
Nolan Simbulan	on his own behalf
Kathleen Demic	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by 7217081 Canada Ltd. carrying on business as Concrete Image, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued January 31, 2012.
2. Nolan Simbulan was employed by Concrete Image, a concrete installation company, from March 29, 2011, until August 1, 2011. He filed a complaint with the Director alleging that Concrete Image had contravened the *Act* in failing to pay overtime for work in excess of 8 hours per day and in failing to pay vacation pay.
3. Mr. Simbulan’s complaint was adjudicated by way of an oral hearing. The primary issue before the Director’s delegate was whether or not Mr. Simbulan was a manager, as Concrete Image contended, or an employee/supervisor, as alleged by Mr. Simbulan. The delegate concluded that Mr. Simbulan was not a manager and that he was entitled to compensation for overtime wages. The delegate concluded that Concrete Image had contravened sections 40 and 58 of the *Act* in failing to pay Mr. Simbulan all wages owing. The Director’s delegate determined that Mr. Simbulan was entitled to wages and accrued interest in the total amount of \$5,115.33. The Director also imposed two administrative penalties in the amount of \$500 each for Concrete Image’s contraventions of section 18 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”), for a total amount payable of \$6,115.33.
4. Concrete Image contends that evidence has become available that was not available at the time the Determination was being made and seeks to have it referred back to the Director.
5. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This decision is based on the written submissions of the parties.

ISSUE

6. Whether or not new evidence has become available at the time the Determination was being made that would have caused the Director to arrive at a different conclusion on a material issue.

FACTS AND ARGUMENT

7. The parties agreed that Mr. Simbulan was to receive a monthly salary based on 20 working days. The parties also agreed that Mr. Simbulan was able to work for another employer if Concrete Image had insufficient work

for him, and that \$200 per day would be deducted from his pay, which was the equivalent of \$25 per hour for an 8 hour day. Mr. Simbulan's evidence was that he was to be paid \$4,000 per month, which was based on an 8 hour day, 40 hour week. It was Mr. King's evidence that Mr. Simbulan's wage statement indicated an hourly rate of pay of \$25 only because the automated payroll program he used required an entry for that figure.

8. Mr. Simbulan's evidence was that he was hired primarily to place and finish concrete "pours" but that he also had some supervisory duties including scheduling employees and recording the hours they worked, and that he had completed hazardous materials reports. He asserted that Mr. King made all final decisions on every job and was on site to oversee the work. Mr. Simbulan said that he had no authority on financial issues, including bidding on jobs or setting wages; hiring or firing employees; or on the purchase of supplies. Although Mr. Simbulan agreed that he participated in some employee interviews, he only listened and offered his opinion about the applicant after the interview was completed, with Mr. King having the final decision about who to hire. Mr. Simbulan also said that he had no authority to fire employees. Mr. Simbulan's witness, a former Concrete Image employee, testified that Mr. King made all the decisions about hiring and firing employees and was responsible for dispatching employees to each job site. The witness also testified that Mr. King dealt with the main contractors on each job and made the decisions about each job. The witness agreed that Mr. Simbulan made decisions about the placing and conduct of the pour and whether or not the job was satisfactory. The witness also agreed that Mr. Simbulan was responsible for the work at a job site if Mr. King was not present.
9. Mr. King's evidence was that Mr. Simbulan proposed that Concrete Image hire him as a manager and he would provide crews and manage the jobs. Mr. King said that he agreed to this proposal.
10. Although Mr. King agreed that he hired some staff, he asserted that Mr. Simbulan recruited and hired people he knew, and later attempted to get one a raise. Although Mr. King disagreed with giving the employee a raise, Mr. Simbulan made a decision to upgrade the employee's duties so that he could earn a higher wage. Mr. King said that although he disagreed with that decision, he believed it was Mr. Simbulan's right to make it. Mr. King also testified that Mr. Simbulan made other staffing decisions, such as arranging for additional labour on some days. Mr. King also testified that Mr. Simbulan made the decision to fire one employee.
11. Mr. King testified that Mr. Simbulan met with main contractors at job sites and booked jobs, made decisions about required supplies and equipment, and called and scheduled employees for those jobs. Mr. King contended that Mr. Simbulan had the authority to make whatever decisions he deemed necessary to manage the job and Mr. King understood that he was a manager with the authority to do that work.
12. Mr. Simbulan's response was that Mr. King required someone with knowledge and experience to place and finish concrete and that was the reason he had been hired. He acknowledged that his job was akin to a project manager, but that did not equate to being a manager, as his main job was to place and finish concrete.
13. Mr. King admitted that he was withholding Mr. Simbulan's annual vacation pay until Mr. Simbulan returned a hammer drill. Mr. Simbulan contended that arrangements had been made for Mr. King to collect the equipment.
14. After reviewing all of the evidence and submissions, the delegate determined that Mr. Simbulan was not a manager. She noted that the key to the determination as to whether or not an individual was a manager was the degree of authority and or discretion exercised by that individual and depended on the total characterization of that individual's responsibilities. She held that, based on the evidence,

... although Mr. Simbulan had some authority at the job site, his authority related to supervising other employees and making technical decisions in his capacity as a concrete placer/finisher. As such I find he was not a manager as defined by the *Regulation* and is not excluded from the overtime provisions of the *Act*.

15. The delegate determined that the parties agreed that Mr. Simbulan was to work an 8 hour day at a rate of \$25 per hour and 20 days per month, for a total of 160 hours per month.
16. In the absence of any records from Mr. King, the delegate relied on Mr. Simbulan's typed list of hours he worked in excess of his regular hours. She noted that Mr. King did not dispute the number of hours Mr. Simbulan claimed to work each week, disputing only that he was not entitled to overtime wages on the basis that he was a manager.
17. The delegate found that Mr. Simbulan was entitled to 129.25 hours of overtime wages. Mr. King agreed that Mr. Simbulan had not been paid vacation pay and again, in the absence of employer records, the delegate accepted the accuracy of Mr. Simbulan's calculations.
18. Concrete Image says that it "would like to have a review" of the delegate's conclusion that Mr. Simbulan was a manager. Mr. King asserted that he was "not given the opportunity to provide witnesses and evidence in our first hearing". Mr. King further contended that Concrete Image had "evidence" that Mr. Simbulan "fabricated" hours that he did not work, "took hours from other employees' log books" and provided "falsifying evidence" to the delegate. Mr. King further asserts that Mr. Simbulan "lied repeatedly giving false statements in the hearing." Mr. King contended that Mr. Simbulan gave "misinformation" regarding Mike Best and wanted to call Mr. Best as a witness, in addition to other witnesses.
19. Mr. King stated that he had reviewed his paperwork to analyze the overtime claim advanced by Mr. Simbulan and prepared a commentary of the hours Mr. Simbulan worked each day.
20. Mr. King also stated that Concrete Image did not have an opportunity to prepare its witnesses and information properly as it is a seasonal operation. He said that as he was in the process of shutting down for the winter and moving the office back to Regina, he received mail regarding the deadline for submitting records only hours before the deadline. He says that Concrete Image has now had the opportunity to prepare for the hearing.
21. Mr. King further argued that the delegate erred in calculating Mr. Simbulan's hours and rate of pay and submitted what he stated were the correct calculations.
22. The delegate submits that the appeal should be dismissed. She contends that the evidence Mr. King seeks to provide on appeal was available at the time of the hearing and that an appeal is not an opportunity to present evidence that should have been advanced before a delegate at first instance.
23. The delegate says that, following an unsuccessful attempt to mediate Mr. Simbulan's complaint, the matter was set down for a hearing. On December 13, 2011, the Director issued a Demand for Employer Records along with the Notice of Hearing. The date for the delivery of those records was December 30, 2011.
24. The delegate says that on January 6, 2012, Mr. King called the delegate who conducted the mediation and explained that he had just received the Demand for Records. He was concerned and asked the delegate for an extension of time, and also sought an adjournment of the hearing to a later date. The delegate explained to Mr. King that he had to submit the request in writing before the hearing date, and advised him to include

reasons for the request. The delegate noted that Mr. King agreed to send in the Employer Records and agreed to pay vacation pay prior to the hearing.

25. The day before the hearing, Mr. King telephoned the Branch to again request an adjournment. The delegate explained that no written request had been submitted and that the hearing would proceed unless he submitted the request in writing along with reasons for the request and that the hearing would proceed with or without Mr. King.
26. Mr. King did participate in the hearing by telephone. The delegate says that she asked Mr. King about the lack of documentary evidence, in particular the pay records that were the subject of the Demand. The delegate said that Mr. King told her that he had missed the deadline and thought he was unable to submit anything after the deadline had passed. The delegate submits that she pointed out to Mr. King the fact that he had discussed this issue with another delegate and granted an extension to the Demand deadline. The delegate asserts that Mr. King simply repeated that he had missed the original deadline.
27. The delegate says that Mr. King had discussions with Branch delegates on November 1, 2011, regarding education and information about the *Act*, received facts sheets regarding the issues of the complaint, and participated in a mediation session where the issues were discussed in depth. The delegate says that Mr. King had approximately 12 weeks to obtain the records he says he did not have the opportunity to provide during the hearing. As such, she submits that Concrete Image ought not be entitled to submit evidence he ought to have provided at the hearing.
28. Mr. Simbulan contends that Mr. King ought to have challenged the hours he worked “the first time around” if he had any concerns about them. Mr. Simbulan also contends that Mr. King has provided no evidence supporting Concrete Image’s contention that Mr. Simbulan was a manager. The balance of Mr. Simbulan’s submissions relate essentially to the “facts” alleged by Mr. King in his appeal submission and are not relevant to my decision.

ARGUMENT AND ANALYSIS

29. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was made.
30. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
31. Although Concrete Image alleges that evidence has become available that was not available at the time the Determination was made, in essence, Mr. King seeks a new hearing, with the opportunity to call the witnesses and present the evidence he ought to have provided at the hearing before the delegate.
32. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, 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.

33. An appeal is not meant to be an opportunity for an appellant to re-argue a dispute that has already been argued before the delegate. Clearly, all of the “evidence” Concrete Image now wishes to present was available at the time of the hearing. Not only did the Director issue a Demand for Records, which Concrete Image failed or refused to provide, but Mr. King did not challenge Mr. Simbulan’s overtime hour claim at the hearing. Therefore, this narrative does not constitute new evidence.

34. I am satisfied that Concrete Image was provided with extensive information on the hearing process and the issues in dispute as well as significant guidance on his obligation to provide Records as required by the Demand. I am also satisfied that he was given information regarding adjournment requests. I am also satisfied that although Mr. King was specifically asked about the lack of documents during the adjudication hearing he made no attempt to provide the evidence he now suggests he has.

35. Mr. King has made assertions that Mr. Simbulan “lied”, presented fraudulent evidence and gave misleading evidence at the hearing. Mr. King had full opportunity to challenge that evidence at the hearing and cannot now suggest that it is unreliable.

36. The appeal is dismissed.

ORDER

37. Pursuant to section 115 of the *Act*, I order the Determination dated January 31, 2012, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal