

An appeal

- by -

683233 B.C. Ltd. operating as Pacific Kia, Cal National Leasing Ltd. and  
Lenux Motorcars & Leasing Ltd., Associated Employers

- 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:** Robert Groves

**FILE No.:** 2006A/9

**DATE OF DECISION:** April 3, 2006

## DECISION

### OVERVIEW

1. This is an appeal by 683233 B.C. Ltd. operating as Pacific Kia, Cal National Leasing Ltd. and Lenux Motorcars & Leasing Ltd., associated employers (the “Employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) against a determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) on December 20, 2005 in respect of a complaint filed by Joseph P. Antao (“Antao”). In that Determination the Delegate found that the Employer had contravened sections 27, and 40 of the *Act* and section 46 of the *Employment Standards Regulation* (the “Regulation”), the relevant portions of which require that an employer provide an employee with a written wage statement on a payday, pay overtime wages, and produce records, respectively.
2. Pursuant to section 79 of the *Act*, the Delegate ordered the Employer to cease contravening the *Act* and the *Regulation*. She also ordered the Employer to pay overtime wages, concomitant vacation pay, and accrued interest to Antao in the amount of \$11,524.91. Finally, the Delegate imposed three administrative penalties of \$500.00 each pursuant to section 29(1) of the *Regulation*. The amount found to be payable by the Employer therefore totalled \$13,024.91.
3. The Employer filed its appeal with the Tribunal on January 11, 2006. On January 12, 2006, the Tribunal wrote to the parties, requesting the record from the Delegate, and inviting submissions. In other correspondence addressed to the parties also dated January 12, 2006, the Tribunal ordered that the Determination be suspended, and the net amount payable under it to be held in trust, until the Tribunal decided the appeal on the merits, pursuant to section 113 of the *Act*.
4. The Delegate forwarded the record, and a submission, dated January 13, 2006. On February 3, 2006, the Tribunal wrote to the Employer and Antao, enclosing copies of the material received from the Delegate, and requesting final submissions. No further submissions were received.
5. On February 21, 2006, the Tribunal advised the parties that the appeal would be determined on the basis of the written submissions received from the parties.

### FACTS

6. The Employer operated a car dealership known as Pacific Kia. Antao was employed as an accountant/bookkeeper from July 21, 2000 until August 24, 2005.
7. At the hearing conducted by the Delegate the Employer's general manager, Tony Zeban (“Zeban”) acknowledged that the various legal entities making up the Employer were integrated operations doing similar types of business, sharing common officers and directors, common office staff and payroll facilities, common premises and telephone numbers, and common banking facilities. As Pacific Kia had ceased operating by the time Antao’s complaint was heard, the Delegate determined that the various corporate entities involved within the integrated operations of the Employer constituted an associated employer for the purposes of section 95 of the *Act*.

8. The Delegate considered three issues arising from the facts before her:
  - a) was Antao a manager?
  - b) was Antao entitled to overtime wages?
  - c) was the Employer liable for any other violations of the *Act*?
9. Antao was employed as an accountant and bookkeeper. The Delegate found no evidence to support a finding that Antao's duties included the supervision or direction of other employees, or the exercise of any authority or discretion which would be symptomatic of status as a manager.
10. The Delegate's examination of the issue of overtime was complicated by the fact that the Employer failed to produce records setting out the hours Antao had worked, notwithstanding that Zeban indicated they existed, and a Demand for Employer Records had been forwarded to the Employer, to which the Employer had appeared to make at least a partial response. Antao, on the other hand, produced records of the hours he had worked, which showed a consistent pattern of his having worked overtime. The Delegate found Antao to be a credible witness, and determined that overtime was payable.
11. The Delegate determined that the Employer had also contravened section 46 of the *Regulation* when it failed to respond adequately to a Demand for Employer Records forwarded by registered mail. That Demand specifically requested records relating to, among other things, "hours of work". Despite the fact that the Employer appears to have responded in part to the Demand, it produced no records relating to the hours Antao worked.
12. Finally, the Delegate determined that while Antao received wage statements from the Employer, they did not comply with the requirements of section 27 of the *Act* in that they did not show the employer's name and address, the hours worked, nor Antao's wage rate.
13. The Employer seeks cancellation of the Determination, and argues that:
  - a) the Delegate failed to observe the principles of natural justice in making the Determination; and
  - b) evidence has become available that was not available at the time the Determination was being made.

## ISSUE

14. Can it be said the Determination should be cancelled on any of the grounds alleged by the Employer?

## ANALYSIS

15. The jurisdiction with respect to appeals is set out in section 112(1) of the *Act*, which provides that a person served with a determination may appeal it 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.
16. Here, the Employer asserts that the Determination should be cancelled on the basis of grounds (b) and (c). I will deal with these in turn.

### *Failure to observe the principles of natural justice*

17. A challenge to a Determination based on an alleged failure to observe the principles of natural justice gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in the Employer's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence. The duty is captured, at least in part, in section 77 of the *Act*, which requires that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond.
18. The Employer's Appeal Form checks off the box which refers to this ground of appeal, but nowhere in the sparse material provided by the Employer in support of its appeal is there any discussion relating to the topic. The Appeal Form asks an appellant to provide a detailed submission on why the appeal should be allowed. It is not for the Tribunal to divine what matters of fact and law an appellant might have in mind when a particular ground of appeal is identified. Rather, an appellant must take care to set them out in sufficient detail so as to make clear the substantive basis for the selection of that particular ground of appeal. It is only when the context is explained in this manner that it becomes possible for the Tribunal to consider, and decide, a ground of appeal properly.
19. In this case, I have reviewed the record, and the detailed Reasons for Determination provided by the Delegate. It is not obvious to me that the Employer was unaware of the nature of the complaints levelled against it, or that it was denied an opportunity to be heard in respect of them. Without elaboration of the areas of concern in respect of which the Employer felt the need to appeal the Determination on this basis, I must find that this ground of appeal must fail.

### *New evidence*

20. The Employer's Appeal Form asserts that evidence has become available that was not available at the time the Determination was being made. The Employer's submission in support of its appeal says this:

Pertinent evidence appears to have been destroyed by Mr. Antao. We are continuing our search and are finding new evidence.

Records have been tampered with and are proving difficult to find. We request additional time to attempt to find all documentation which we will forward to you. We do not want our appeal limited to the documents presently at our disposal.

21. The jurisprudence developed by the Tribunal relating to this ground of appeal reveals that an appellant will not normally be permitted to rely on evidence that was available and, with the exercise of due diligence, could have been presented to the Director prior to the determination being made. The rule will be applied even more strictly where it is demonstrated that the party seeking to tender the evidence either refused or neglected to participate fully in the process leading to the making of the determination. However, late evidence may be admitted where an employer takes the position that it complied with the *Act* and that documents in support existed, but it was having difficulty locating the documents (see *Re Senor Rana's Cantina Ltd.* BC EST #D017/05; *Falcon Overhead Doors Ltd.* BC EST #D405/99).
22. Apart from these factors, the Tribunal must also be satisfied that the evidence is relevant to a material issue arising from the complaint, it is credible in the sense that it is reasonably capable of belief, and it has 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 a material issue (see *Re Merilus Technologies Inc.* BC EST #D171/03).
23. Part of the difficulty I have with the characterization of the Employer's position on this topic on this appeal is that the evidence alleged to have been destroyed, or tampered with, is not identified with particularity, either in terms of what the evidence consists of, or what substantive matters of concern the evidence relates to. All that is said is that the evidence is "pertinent". I cannot, therefore, from the submissions made by the Employer, determine whether the evidence is relevant, credible, or of high probative value.
24. Furthermore, there is no explanation given in the Employer's submissions as to why, with due diligence, the evidence could not have been presented to the Delegate prior to the making of the Determination. I am not, therefore, in a position to decide that the evidence was "not available" at the time the Determination was made.
25. The Employer's submissions request that additional time be provided to allow it to find the pertinent evidence and forward it to the Tribunal. Yet no further submission relating to the time required, or the evidence that had, or might, be found was thereafter received by the Tribunal, notwithstanding that the Vice-Chair wrote to the Employer on February 3, 2006 requesting final submissions by February 17, 2006.
26. It is important that appellants remember that the onus is on them to demonstrate that a ground of appeal they have identified on the Appeal Form is made out. Moreover, in the absence of unusual circumstances, the timelines for filing appeals, and providing submissions, must be adhered to. This means that appellants must act expeditiously to marshal and present all the facts and arguments on which they intend to rely on appeal at a very early stage. This is consistent with a purpose of the legislative scheme set out in section 2 of the *Act*, which is to provide fair and efficient procedures for resolving the disputes which arise under it.
27. In my opinion, the Employer has failed to satisfy the burden on it to demonstrate that new evidence has become available that was not available at the time the Determination was being made.

**ORDER**

28. Pursuant to section 115(1) of the *Act*, I order that the Determination dated December 20, 2005 be confirmed.

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**Robert Groves**  
**Member**  
**Employment Standards Tribunal**