



An appeal

- by -

York Security Ltd.

- 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.: 2007A/17

DATE OF DECISION: May 15, 2007

8. Mr. Fanous regularly worked long hours for the Employer, including significant periods of overtime. He kept detailed records of his hours of work. The Employer did not.
9. The evidence before the Delegate suggests that Mr. Fanous loaned monies to the Employer on occasion. A transaction which became contentious occurred on or about September 1, 2005, when Mr. Fanous obtained a draft for \$5,000.00 made payable to the Employer, and delivered it to one of its principals, a Mr. Narayan. While the draft was made payable to the Employer it was acknowledged that Mr. Narayan considered it to be a loan to himself personally.
10. On or about December 8, 2005, Mr. Narayan obtained a bank draft payable to Mr. Fanous in the amount of \$5,000.00 from a Mr. Sandhu, who was at that time in the process of purchasing shares in the Employer belonging to another principal of the company, a Mr. Singh. Mr. Narayan delivered the draft to Mr. Fanous, who later told the Delegate he understood his receipt of these funds to be a repayment of the loan made by him the previous September. The principals of the Employer told the Delegate they understood the delivery of the draft to be a payment to Mr. Fanous of wages owed to him at that time. The Delegate concluded that the December 8, 2005 payment to Mr. Fanous was, more probably than not, a repayment of the September loan.
11. Throughout the period of his employment Mr. Fanous received paycheques that did not remunerate him completely for the regular and overtime hours he had worked during the pay period. At no time did he receive statutory holiday pay. Over time, these unpaid hours continued to accumulate, a fact acknowledged by the Employer. When his employment ended, on November 27, 2005 he received no vacation pay, and no compensation for length of service.
12. Mr. Fanous' evidence was that he finally left his position of employment because several of his paycheques were dishonoured. The Employer did not dispute that this had occurred, but argued that Mr. Fanous' employment had come to an end because he had quit. In December 2005 the Employer did pay Mr. Fanous several thousands of dollars as reimbursement for the monies it acknowledged it owed him. The Employer stated to the Delegate that no further sums were owed. Mr. Fanous disagreed.
13. Owing largely to the fact that the Employer had kept no substantial records of its own, and admitted that it relied on Mr. Fanous' records in determining his wages throughout the time he was employed, the Delegate accepted Mr. Fanous' records for the purpose of determining the amounts owed to him under the *Act*.
14. The Delegate also concluded that Mr. Fanous was entitled to compensation for length of service, on the basis that the Employer's failure to pay him his wages on a regular basis amounted to a substantial alteration of a fundamental term of Mr. Fanous' employment, which justified his departure at the end of November 2005.

ISSUES

15. Can it be said that the Employer has established grounds entitling the Tribunal to vary or cancel the Determination, or refer the matter back to the Director for consideration afresh?

ANALYSIS

16. Section 112(1) of the *Act* 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.
17. In this case, the Employer has indicated on its Appeal Form that it wishes to challenge the Determination on the basis that the Director failed to observe the principles of natural justice. Such a plea raises 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 against it, or an opportunity to be heard in its own defence. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond.
18. Having reviewed the materials submitted on this appeal, I cannot conclude that the Employer was denied an opportunity to know the case being made against it, or an opportunity to be heard in reply. The Delegate conducted a hearing at which several witnesses on behalf of the Employer gave evidence. The summary of their testimony which appears in the Delegate's Reasons for the Determination demonstrates that the Employer was alive to the issues the Delegate was seeking to resolve and took advantage of the opportunity afforded at the hearing to make submissions thereon. Neither the record supplied by the Delegate, nor the Appeal Form and memorandum supplied by the Employer, point to circumstances suggesting that the Delegate acted in violation of the principles of natural justice.
19. This is not the end of the matter, however. In order to do justice to the parties to an appeal, most of whom will be unrepresented by legal counsel, it is the practice of the Tribunal to seek to discern the true basis for a challenge to a determination, regardless of the particular box an appellant has checked off on an Appeal Form (see *Triple S Transmission Inc.* BC EST #D141/03).
20. In its memorandum delivered with its Appeal Form, the Employer identifies six matters it wishes considered, all of which appear to raise questions of fact. I will deal with them in order, and in the language in which they appear in the memorandum.
- 1. *"Khushdeep Sandhu gave \$5000 to Mr. Fanous for wages and this amount was not considered by the Delegate of the Director of Employment Standards as wages. We want this clarification."***
21. I infer from this language that the Employer challenges the Delegate's finding that the \$5,000.00 received by Mr. Fanous in December 2005 was repayment of a loan, and not a payment of unpaid wages.
22. In my view, the Delegate's finding on this issue was a finding of fact. It involved the Delegate's analyzing the circumstances surrounding the payment and his determining its substantive purpose. Given the totality of those circumstances, the Delegate concluded, on balance, that the payment was intended to act as the repayment of a loan, and not the payment of unpaid wages.

23. Under the current scheme for the resolution of complaints under the *Act*, the responsibility for finding facts rests with the Director and his delegates. The jurisdiction of the Tribunal to review findings of fact is limited. Indeed, in order for an appellant to successfully challenge a Delegate's finding of fact he must persuade the Tribunal that the error in fact amounts to an error of law. In order to do that, the appellant must establish what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of the Delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354).

24. In my opinion, there was evidence before the Delegate which could have led him to conclude that the \$5,000.00 payment in December 2005 was made for the purpose of repaying a loan, and not to reimburse Mr. Fanous for unpaid wages. The Delegate decided that the \$5,000.00 payment was repayment of loan for at least the following reasons:

- Mr. Narayan acknowledged his personal indebtedness to Mr. Fanous in the amount of \$5,000.00 in September 2005;
- On December 8, 2005, Mr. Narayan delivered a bank draft to Mr. Fanous in the amount of \$5,000.00, exactly the same sum as that owed pursuant to the September loan;
- The Employer did not provide evidence demonstrating that the wages owed to Mr. Fanous on December 8, 2005 amounted to exactly \$5,000.00;
- The Employer did not provide any payroll records supporting the assertion that the \$5,000.00 paid was wages;
- There were no notations on the December 8, 2005 bank draft suggesting that it was obtained for the purpose of paying Mr. Fanous unpaid wages;
- There was no evidence that the December 8, 2005 bank draft had been accompanied by an attached wage statement.

25. These facts, taken together, establish an evidentiary basis for the Delegate's conclusion, which is sufficient to dispose of this aspect of the Employer's appeal.

2. "As new owners of the Company we believe that Mr. Fanous had other personal dealings with the former Directors of York Security Ltd."

26. This statement is speculative, at best. Also, it was nowhere made apparent in the materials submitted by the Employer why Mr. Fanous' previous dealings with former directors of the Employer might be relevant to a resolution of the issues raised in the appeal. *MSI Delivery Services Ltd.* BCEST D051/06 is authority for the proposition that it is up to the appellant to ensure the sufficiency of the appeal. It is not for the Tribunal to divine the substance of the point an appellant wishes to make.

27. Furthermore, if Mr. Fanous' previous dealings were thought to be relevant, the Employer had an obligation to raise the matter in the proceedings before the Delegate, at first instance. An appeal does not amount to a re-hearing, or a re-investigation of a complaint. It is an error correction process, with the burden of showing error on the appellant (see *MSI Delivery Services Ltd., supra; Re Bruce Davies et al.* BCEST #D171/03; *J.P. Metal Masters 2000 Inc.* BCEST #D057/05). This is consistent with a principle underlying the *Act* expressed in section 2(d), which is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the legislation. A party is therefore expected

to take the complaint process seriously, to co-operate with the Director, and to present all arguments which the party may reasonably expect should be made to a delegate before the determination is made.

28. I am not persuaded that this concern on the part of the Employer is articulated in such a way as to support an argument, on any proper ground under section 112, that the Determination must be cancelled or varied.

3. *"We still need clarification why Mr. Fanous was still employed when he was not paid?"*

29. For the reasons set out in my discussion of item #2, above, it is my view that if this was a matter that the Employer felt it important to know, for the purposes of participating effectively at the hearing conducted by the Delegate, and responding to the complaint, it behooved the Employer to ask the question of Mr. Fanous at the hearing. An appeal does not constitute an opportunity to re-investigate a complaint.

4. *"Also as mentioned by the previous Director Mr. Fanous was paid cash payments for wages which the Delegate of the Director of Employments (sic.) Standards did not consider."*

30. Contrary to this statement, the issue of Mr. Fanous' receiving cash payments from time to time was dealt with by the Delegate in his Reasons for Determination. Based on the oral evidence of the parties and their witnesses, and the documentary record produced to him, the Delegate found that the Employer had not provided adequate proof that such cash payments were made, apart from one instance in September 2005.

31. It is clear, therefore, that the Delegate did not ignore the Employer's assertions concerning cash payments. Rather, the Delegate took the alleged cash payments into account when making his Determination, and decided, on the evidence tendered to him, that the bulk of such payments remained unproven. On the basis of the pay stub and other documentary information available, it cannot be said that there was no evidence to support the Delegate's finding. The fact that the Employer may feel the Delegate came to the wrong conclusion on the point does not, standing alone, show that the Delegate thereby committed an error of law.

5. *"If Mr. Fanous (sic.) records are correct and written on a daily basis, why was he unable to write in his daily records what kind of cash payments he received from Mr. Narayan."*

32. This question raises the same problem for the Employer as I discussed with respect to item #2, above. It poses the type of question the Employer should have asked Mr. Fanous at the hearing conducted by the Delegate, if it were thought to be important. Asking such a question for the first time on appeal does not assist my inquiry.

33. The final issue posed by the Employer is phrased as follows:

6. *"Since there was a change of Directors after the employment period in question, we as current directors want to know the unpaid wages which the former Director's (sic.) are liable for which is not clearly determined."*

34. In his submission on the appeal the Delegate addressed this matter as follows:

The employer submits correctly that it has not been clearly determined what amount of unpaid wages the Directors of York Security Ltd. are liable to pay....The determination did not address

corporate Director or Officer liability for the employer's unpaid wages. The Delegate submits that this is not a proper ground for appeal since a determination has not been made respecting Director liability.

35. I agree. My jurisdiction is limited to the Determination. As no determination has yet been made concerning the liability of the Employer's directors, I must decline to consider this aspect of the Employer's appeal.

ORDER

36. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated January 24, 2007 be confirmed.

Robert Groves
Member
Employment Standards Tribunal