



An appeal

- by -

M.S.I. Delivery Services Ltd.
("M.S.I.")

- 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: David B. Stevenson

FILE No.: 2006A/28

DATE OF DECISION: April 24, 2006

DECISION

SUBMISSIONS

Mike Savage	on behalf of M.S.I. Delivery Services Ltd.
Herbert E. Campbell	on his own behalf
Judy Reekie	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by M.S.I. Delivery Services Ltd. (“M.S.I.”) of a Determination that was issued on January 11, 2006 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that M.S.I. had contravened Part 3, Sections 17, 18 and 21, Part 4, Section 40, Part 5, Section 45 and Part 7, Section 58 of the *Act* in respect of the employment of Herbert E. Campbell (“Campbell”) and ordered M.S.I. to pay Campbell an amount of \$16,752.95, an amount which included wages and interest.
2. The Director also imposed an administrative penalties on M.S.I. under Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$3000.00.
3. The total amount of the Determination is \$19,752.95.
4. M.S.I. says the delegate made several errors of law and failed to observe principles of natural justice in making the Determination. The errors alleged to have been made will be identified and discussed later in this decision. M.S.I. also submits there is evidence that has become available which was not available at the time the Determination was made.
5. In its appeal submission, M.S.I. has asked for an oral hearing. Whether the Tribunal considers the appeal has merit or not, we are not required to hold an oral hearing. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act* (“ATA”) including section 36 which states, in part: “. . . 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). In my view, an oral hearing is not necessary to decide this appeal. Findings of fact have already been made by the Director in the complaint hearing. I shall address the effect of the attempt by the appellant to challenge or supplement those findings of fact by seeking to introduce additional evidence in this appeal later in this decision.
6. I have before me the section 112(5) record as well as written submissions from M.S.I., Campbell and the Director. No argument has been made concerning the sufficiency of the record. It is the responsibility of M.S.I. to ensure the sufficiency of the appeal.

ISSUES

7. The issues in this appeal are whether the Director erred in law; whether the Director failed to comply with principles of natural justice in making the Determination and whether there is “new” evidence which the Tribunal should accept on this appeal.

THE FACTS

8. Campbell had filed a complaint with the Director alleging M.S.I. had contravened the *Act* by failing to pay him regular wages, overtime, annual and statutory holiday pay, length of service compensation, by deducting amounts from his wages and by failing to reimburse for fuel expenses.
9. The background facts provided in the Determination indicate that M.S.I. operates a delivery service in Coquitlam, B.C. and that Campbell was hired by M.S.I. as an owner/operator delivery driver on June 18, 2004. Campbell terminated his employment with M.S.I. in January 2005.
10. The Director issued a Demand For Employer Information on June 22, 2005. There is no dispute that Demand was received by M.S.I. The demand required M.S.I. to “disclose, produce and deliver” all employment information for Campbell, including “payroll information relating to wages, hours of work and conditions of employment as specified in Section 28 of the *Employment Standards Act*” and information relating generally to work performed by him.
11. A hearing was held on the complaint on July 19, 2005. M.S.I. and Campbell attended that hearing and were allowed the opportunity to participate fully in that process.
12. The issues considered by the Director in investigating and deciding the complaint were whether Campbell was an employee under the *Act* and, if so, whether he was owed wages and in what amount.
13. The Director concluded that Campbell was an employee under the *Act*. The Determination records the following findings of fact which were used to reach that conclusion:
 - M.S.I. had direction and control over Campbell. Campbell was hired to pick up and deliver goods to and from M.S.I.’s customers. M.S.I. set Campbell’s route and directed him where and when to pick up or drop off goods during the work day.
 - Campbell was required to keep a record of the pickups and deliveries that he made during the day and submit those records to M.S.I.
 - Campbell was required to be available to M.S.I. via radio communication throughout the day.
 - Campbell presented himself to the customers he served as a representative of M.S.I. and all the customers he served were customers of M.S.I.
 - The customers served by Campbell were billed by M.S.I. and, except on rare occasions such as COD deliveries, made payment directly to M.S.I.
 - There was no evidence that Campbell was able to serve customers other than those he served for M.S.I.

- There was no evidence that Campbell had a chance to profit, except through increasing his labour, or a risk of loss from his relationship with M.S.I.
- If Campbell was unable to work due to illness or other reason, M.S.I. obtained a replacement for his route. M.S.I. said Campbell could hire a replacement driver provided the replacement was approved by them, but there is no indication in the material that Campbell ever sought to hire a replacement.
- Campbell was an integral part of M.S.I.'s business: he served M.S.I.'s customers, represented M.S.I. in his dealings with those customers, wore an M.S.I. uniform and was required to communicate with M.S.I.'s dispatch office throughout the day. He was required to pay into M.S.I.'s "social fund".
- The business belonged to M.S.I. Campbell had no interest in the business. The customers served by Campbell paid M.S.I. (excepting those rare occasions), not Campbell. M.S.I. set the work standards and paid Campbell based on terms set by M.S.I.
- Campbell owned the truck he drove and paid for the fuel used to perform the work. Campbell was required to "rent" a radio from M.S.I. The requirement for Campbell to own a truck was set by M.S.I. and was a condition of Campbell's employment with them.

14. The Director found Campbell terminated his employment with M.S.I. on January 3, 2005.
15. The Director found Campbell was owed regular wages by M.S.I. There was a dispute between Campbell and M.S.I. about the wage rate and other financial terms, which were resolved in favour of M.S.I. The Director reviewed payroll records provided by M.S.I., found that M.S.I. owed Campbell regular wages and calculated the amount owed as being \$2,152.25. M.S.I. said it had sent Campbell his final pay - an amount of \$239.00. Campbell said he had not received his final pay. M.S.I. was unable to produce any record of this amount having been received by Campbell and the Director found that M.S.I. had failed to pay Campbell all outstanding wages owed within six days of Campbell terminating his employment with M.S.I.
16. M.S.I. did not submit any records of daily hours worked by Campbell. In support of his claim for overtime, Campbell provided some evidence of daily hours worked. The Director did not accept all of Campbell's evidence, but accepted that Campbell had worked overtime and calculated there was overtime wages owed in the amount of \$7,917.80.
17. The Director found that Campbell was entitled to statutory holiday pay for August 2, September 6 and October 11, an amount of \$253.66.
18. Campbell claimed M.S.I. had made deductions from his wages, for radio rental, uniforms, a social fund and WCB without his written authorization. M.S.I. was unable to show any written authorization from Campbell for these deductions. The Director found that M.S.I. had contravened Section 21 of the *Act* by making those deductions without Campbell's written authorization. The Director also noted that written authorization would not have been effective to allow M.S.I. to deduct amounts for radio rental and uniforms. The Director also found the cost of fuel, which was borne by Campbell was a cost of doing business for M.S.I. for which it was responsible. M.S.I. was ordered to reimburse Campbell for fuel costs

paid by Campbell in the period July 26, 2004 to November 8, 2004 in the amount of \$3,065.32. the Director rejected a claim by Campbell for reimbursement of meal costs.

19. M.S.I. had charged Campbell an amount of \$810.21 for the cost of goods that had gone missing. The Director found that to be a contravention of Section 21 of the *Act* and ordered M.S.I. to repay that amount to Campbell.
20. The Director rejected Campbell's claim for length of service compensation, finding that Campbell had terminated the employment relationship in early January 2005 when he advised M.S.I. he was quitting.
21. The Director found M.S.I. had contravened Section 58 of the *Act* by failing to pay annual vacation pay and ordered M.S.I. to pay Campbell annual vacation pay in the amount of \$1,013.22.
22. Finally, the Director found that M.S.I. had failed to fully respond to the Demand which had been issued on June 22, 2005. The Director noted that M.S.I. had partially responded to the Demand on July 12, 2004 but had failed to submit records relating to the commissions paid to Campbell and had failed to provide a record of daily hours worked. The Director imposed an administrative penalty for failing to deliver all of the records required to be kept under Section 28 of the *Act*.

ARGUMENT AND ANALYSIS

23. The grounds upon which an appeal may be made are found in subsection 112(1) of the *Act*, which says:

112. (1) Subject to this section, a person served with a determination may appeal the determination 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 made.*

24. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the complaint process, hoping the Tribunal will reach a different conclusion. An appeal is an error correction process with the burden of showing the error being on the appellant. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings amount to an error of law.
25. The most efficient of addressing the appeal is to consider whether there is new, or additional, evidence which the Tribunal should accept and consider, then address any natural justice issues and errors of law using the findings of fact made by the Director in the Determination, the material in the record and any additional evidence allowed to be included in this appeal.
26. M.S.I. says there is evidence that has become available that was not available when the Determination was made. Specifically, M.S.I. has included the following documents with the appeal:

- (i) an invoice relating to a shipment of safety gloves that went missing;

- (ii) a sheet showing commission payments and deductions for Campbell during the period June 20, 2004 to November 20, 2004;
- (iii) a list of hours worked;
- (iv) a Statement of Registration of General Partnership or Sole Proprietorship for Campbell, shown as filed with the Registrar of Companies on September 11, 2004;
- (v) an unsigned service contract;
- (vi) a list of expenses and fuel costs, presumably kept by Campbell;
- (vii) an M.S.I. document, headed Application for Contractor (Owner/Operator), presumably filled out by Campbell; and
- (viii) an M.S.I. document providing general information regarding courier driving.

27. Of the above documents, only the Statement of Registration of General Partnership or Sole Proprietorship is not included in the record and is submitted by M.S.I. as new, or additional, evidence under paragraph 112(1)(c) of the *Act*.
28. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal retains a discretion to allow new evidence. In addition to considering whether the evidence was reasonably available and could have been provided during the complaint process, the Tribunal also considers whether the evidence is relevant to a material issue arising from the complaint and if it is credible, in the sense that it be reasonably capable of belief.
29. Having reviewed the proposed evidence and the submissions by all of the parties relating to it, I conclude it should not be accepted under either the applicable provision of the *Act* or under the general discretionary authority of the Tribunal to allow additional evidence on appeal.
30. I find that this information was reasonably available and could have been provided by M.S.I. during the complaint process. As well, I am not satisfied this information adds anything to the body of evidence which was already before the delegate. M.S.I. refers to this information as a “smoking gun” that could well have the effect of changing the finding on the issue of Campbell’s status under the *Act*. Based on the findings of fact made in the Determination relating to the nature of the relationship between Campbell and M.S.I., that is improbable. The findings of fact made in the Determination quite clearly show an employment relationship and show Campbell to be an employee under the *Act*. Both the service contract and the list of expenses and fuel costs were provided to the Director during the complaint process. The service contract is unsigned and there is nothing in the file indicating, or even suggesting, the service contract reflected the true relationship between Campbell and M.S.I.
31. I will address the remaining grounds of appeal under their respective headings.

Error of Law

32. M.S.I. has alleged the Director erred in law in finding they had deducted an amount of \$810.21 from Campbell’s wages to pay for lost goods. M.S.I. says the error in law is the failure by the Director to give effect to the “proof” provided by M.S.I. that it had paid for this expense and had not deducted it from Campbell’s wages.

33. In reply, the Director says there was evidence presented during the process which, on its face, indicated the amount was taken off one of Campbell's cheques. However, the Director notes that neither M.S.I. or Campbell made reference to that evidence during the complaint process and, in reviewing the material in the file prior to filing a reply, could find no indication on Campbell's pay slips of this amount being deducted. The Director concedes an error may have been made.
34. In his reply, Campbell makes no reference to the specific concern raised in the appeal. I note, however, that his original complaint does not include a claim for this amount. While that is not determinative, it does support my conclusion that the finding relating to this amount was an error by the Director which, being a finding of fact made without evidence, amounts to an error of law (see *Britco Structures Ltd.*, BC EST #D260/03, citing *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.)).
35. M.S.I. also challenges the Director's finding relating to the hours of work claimed by Campbell. M.S.I. says the hours claimed by Campbell include "travel time" which is not an allowable claim under the *Act*. In reply, Campbell says the hours of work he claimed did not include "travel time" and the Director says the finding on hours worked included time travelling because Campbell made a case that he was required to perform work on his way to and from the warehouse. The Director submits this aspect of the appeal simply challenges a finding of fact for which there was some evidence.
36. As I have indicated above, the Tribunal has no authority to consider an appeal based on alleged errors in findings of fact unless such findings amount to an error of law. It is a complete answer to the allegation of error of law relating to the findings of fact to conclude, as I do, that there was some evidence for the findings made by the Director on this point. More particularly, M.S.I. has not shown the findings of fact are inconsistent with and contradictory to the evidence or, to put it in other words, that the evidence does not provide any rational basis for the findings of fact - that they are perverse or inexplicable (see *Britco Structures Ltd.*, *supra*).
37. I will add the following comments. M.S.I. argues the finding on hours of work is "unreasonable and unbelievable". In context, I consider that statement to be no more than a subjective expression of opinion. It is unsupported by any examination of the available evidence that might lead an objective viewer to the same opinion. Also, there is no basis for M.S.I. asserting the Director "simply took everything [Campbell] said at face value" once the issue of his status under the *Act* was decided.

Failure to Observe Principles of Natural Justice

38. The challenge by M.S.I. to the finding of the Director on the hours of work is also framed as a failure by the Director to observe principles of natural justice in making the Determination. As with other aspects of the appeal, M.S.I. has the burden of proof. M.S.I. must establish, through cogent evidence, there was a failure to observe principles of natural justice by the Director. M.S.I. says the breach was in the Director focussing solely on the issue of whether Campbell was an employee under the *Act* and, as a result, failing to give M.S.I. the opportunity to respond on the wage claims. There is no evidence supporting this assertion.
39. On this aspect of the appeal, I agree with the suggestion in the replies of the Director and Campbell, that M.S.I. had adequate notice that Campbell's wage claims were part of the complaint process. A consideration of the wage claims would necessarily involve an assessment of Campbell's hours of work. M.S.I. seems to have appreciated there was some relevance to Campbell's hours of work in providing

their July 11, 2005 response to the Director's Demand for Employer Information, in which Mr. Savage, responding for M.S.I. says, in part:

As an owner operator Mr. Campbell is paid a commission on each delivery and/or pick up made.
As an owner operator Mr. Campbell sets his own hours and MSI does not track the hours worked.

40. Campbell had submitted a spreadsheet setting out his hours of work which had, in turn, been provided to M.S.I. The material shows that M.S.I. had a reasonable opportunity to respond on that issue, including the opportunity to review and challenge the spreadsheet submitted by Campbell during the process.

Remedy

41. In result, the appeal is partly successful. M.S.I. has requested the Determination be cancelled or, alternatively, referred back to the Director. There is no reason to do either.

ORDER

42. Pursuant to Section 115 of the *Act*, I order the Determination dated January 11, 2006 be varied to reduce the wage entitlement to Campbell by an amount of \$810.21, together with any annual vacation pay payable on that amount and any interest which has accrued on that amount under Section 88 of the *Act*. In all other respects the Determination is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal