

An appeal

- by -

Spirits Rising Memorial Society
(“the Society”)

- 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: Margaret Ostrowski, Q.C.

FILE No.: 2009A/032

DATE OF DECISION: May 22, 2009

DECISION

SUBMISSIONS

Rita Godbout	on behalf of Spirits Rising Memorial Society
Gretchen Jordan-Bastow	on her own behalf
Megan Roberts	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Spirits Rising Memorial Society (“the Society”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 2, 2009. In that decision, the Director ordered the Society to pay the sum of \$12,179.80 to its former employee Gretchen Jordan-Bastow (“Jordan-Bastow”) for wages totalling \$7,112.00 pursuant to Section 18 of the *Act*, annual vacation pay of \$1,889.09 pursuant to section 58 of the *Act*, compensation of \$1,615.38 for length of service pursuant to section 63 of the *Act*, and \$563.33 accrued interest required under section 88 of the *Act*. It was also required to pay two administrative penalties of \$500 each under section 29 of the *Employment Standards Regulations* for contraventions of sections 18 and 46 of the *Act*.
2. The Tribunal has reviewed the Determination, the submissions of the parties and the section 112(5) record and has determined that a decision can be made without an oral hearing as there are extensive written submissions from the parties setting out their respective cases.
3. Rita Godbout (“Godbout”) on behalf of the Society on Appeal Form 1 has appealed the Determination of the Director on the grounds that evidence has become available that was not available at the time the Determination was being made. She also stated in her written submissions that Jordan-Bastow did not prove that she had the legal right to employ herself and pay herself as an Executive Director. I take this as a submission of an error of law by the Director in the Determination.¹

ISSUE

4. The issues to be determined by the Tribunal are as follows:
 1. Did the Director err in law?
 2. Is the evidence that the Society tendered evidence that was not available at the time the Determination was made and if so, is that new evidence sufficient to justify the Tribunal to vary or cancel the Determination under appeal or to refer the matter back to the Director?

¹ Regarding the adoption of a liberal view of grounds of appeal, I refer to the analysis in *Triple S. Transmission Inc.*, BC EST #D141/03

BACKGROUND

5. The Society is a non-profit society incorporated on June 30, 2006 with the purpose of honouring the women lost from the downtown eastside of Vancouver; over time it developed a further purpose of teaching skills to First Nations women and youth of their traditional arts and culture. Jordan-Bastow said that when the first grant money came in for the Society in December 2007, she resigned as President of the Society to take the job as its Executive Director at the pay rate of \$3,500 per month. She said that her employment ended on January 12, 2008 at a board meeting where she was suspended without pay. Jordan-Bastow filed a complaint dated May 6, 2008 stating that the Society contravened the *Act* by failing to pay her wages from November 1, 2007 to January 11, 2008, vacation pay, and statutory holiday pay. A hearing was held on September 5, 2008. A Determination was rendered on February 2, 2009 and an appeal was filed by the Society on March 12, 2009.
6. It was found in the Determination that Jordan-Bastow started as Executive Director on December 1, 2006 based on the wage statement dated May 15, 2007. This wage statement shows a “year-to-date” total wage of \$14,520.58. The Director reasoned that if Jordan-Bastow did not commence her employment as Executive Director until April 14, 2007, it did not follow that she would have accumulated a total of over \$14,000. in wages by mid-May. On appeal from the Determination, Godbout on behalf of the Society submitted that the minutes of the Society regarding the resignation of Jordan-Bastow as a director in December 2006 were fabricated and that the Director mistakenly relied on incomplete minutes of April 14, 2007 in her Determination. Godbout submitted for consideration as new evidence a copy of a Form 7 (a Notice of Changes in Directors), filed and registered in the Registrar of Companies on April 17, 2007. That form indicates, *inter alia*, that Jordan-Bastow, Rita Blind and Leona Reid ceased to be directors on March 10, 2007. Godbout further submitted that Jordan-Bastow signed this Form 7.
7. Godbout on behalf of the Society further submitted that Jordan-Bastow did not have the legal right to pay herself for services as Executive Director as there was no motion or agreement by the Society for her engagement as an Executive Director.

ANALYSIS

8. Pursuant to amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are limited to the following as set out in section 112(1):
 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.
9. Godbout on behalf of the Society has appealed on ground (a) (by argument in her submissions) and ground (c). I will deal with ground (c) first, that is, is there evidence now available that was not available at the time the determination was made that should be considered in this appeal. If I so find, then such evidence can be used in my analysis to determine if the Director erred in law.

1. New Evidence

- ^{10.} In *Davies et al (Merilus Technologies Inc.)* BC EST #D171/03, the Tribunal set out the following test regarding the ground for “new evidence”:

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions: (a) 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; (b) the evidence must be relevant to a material issue arising from the complaint; (c) the evidence must be credible in the sense that it is reasonably capable of belief; and (d) 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.

- ^{11.} I adopt the test set out in the above decision as a reasonable statement of a standard to follow in the analysis of whether to accept the newly tendered evidence.
- ^{12.} The Director has submitted that the evidence tendered by the Society as new evidence, the Form 7 filed and registered on April 17, 2007, was clearly available prior to the hearing on September 5, 2008. In reply, Godbout submitted that she was not aware of this Form or otherwise she would have included it previously. There was no explanation given, other than the lack of awareness, as to why she on behalf of the Society had not searched the Registrar of Companies for such a Form in the exercise of due diligence. I find that on this count, this new evidence, that is the Form 7, fails to meet a condition for the admission of new evidence and accordingly cannot be considered. Furthermore, I take note of the Director’s submission that there is a lack of accuracy and credibility of dates listed on the said Form 7 in that those dates are inconsistent with other evidence and I note that there is no evidence that Jordan-Bastow was the signatory to the Form 7 as alleged by Godbout as the signature is illegible. It would be difficult to find this document to be conclusive evidence in favour of the society.
- ^{13.} In regards to the new evidence submitted by Jordan-Bastow, that is, an unsigned “High Level Review” completed on March 14, 2008, I note that there was no reason given why this review was not tendered at the hearing and I therefore find that it fails to meet a condition for the admission of new evidence and accordingly it will not be considered.
- ^{14.} The appeal submission includes a reference to meeting minutes not submitted and other unsubmitted documents. I cannot consider any “unavailable” new evidence as there is no description of such for me to conclude that such was “new”, that is, only becoming available after the hearing; more to the point, these documents were not submitted and therefore cannot be considered evidence.

2. Errors of Law

- ^{15.} The *Act* does not provide for an appeal based on errors of fact and the Tribunal does not consider such appeals unless such findings raise an error of law (*Britco Structures Ltd.*, BC EST #D260/03). The Tribunal has adopted the following definition of “error of law” set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. No. 2275 (B.C.C.A):
1. a misinterpretation or misapplication of a section of the *Act*;
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not be reasonable be entertained; and
 5. adopting a method of assessment which is wrong in principle.
- ^{16.} Godbout, on behalf of the Society, by implication in her written submission, alleges that the Director erred in law in awarding Jordan-Bastow wages as the Director relied on a view of facts which could not be reasonably entertained – that Jordan-Bastow had no legal right to pay herself without a motion appointing her as Executive Director. However, there is no argument presented by the Society to substantiate their position – that there was no evidence of a motion for the appointment and that a motion was needed. I agree that there is no written evidence of such a motion in December 2006 as the minutes were allegedly lost but the Director, on hearing the evidence from the various witnesses at the hearing, found that “on their own evidence, they did not pay much attention to details”, “it does not appear there was much in the way of formal procedures which governed the operation of the Society”, and there was conflicting testimony at the hearing regarding when Jordan-Bastow resigned from the Board to assume the position of Executive Director. The Director wrote in the Determination that: “It seems to me that the Board did not take as active a role in the employment of Ms. Jordon-Bastow as they ought to have.”² The Director found that the wage statement dated 15/05/07 to be the most reliable evidence in regards to how long Jordan-Bastow had been acting as Executive Director. I find this to be a view of the facts, from the inconsistent and poorly documented evidence of the records of this Society, that is reasonably entertained and therefore I find no error in law by the Director.

ORDER

- ^{17.} Pursuant to section 115 of the *Act*, I order that the Determination dated February 2, 2009, be confirmed.

Margaret Ostrowski, Q.C.
Member
Employment Standards Tribunal

² In April 2007, by not investigating or challenging the actions of Jordan-Bastow to that date, the Society could be said to have ratified her actions.