

An appeal

- by -

Sukhdev Sangha carrying on business as Continental Workers' Cooperative

- 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.: 2009A/038

DATE OF DECISION: May 25, 2009

DECISION

SUBMISSIONS

Sukhdev Sangha	on behalf of Continental Workers' Cooperative
Gurdev Johal	on his own behalf
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Sukhdev Sangha carrying on business as Continental Workers' Cooperative, ("CWC"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued February 25, 2009.
2. Gurdev Johal filed a complaint under the *Act* alleging that CWC owed him regular wages, overtime pay, annual vacation pay, statutory holiday pay and compensation for length of service.
3. Following an investigation into Mr. Johal's complaint, the delegate determined that CWC had contravened sections 18, 40, 45, 58 and 63 of the *Act* in failing to pay Mr. Johal wages, overtime, statutory holiday pay, annual vacation pay and compensation for length of service. The delegate determined that Mr. Johal was entitled to wages and interest in the amount of \$15,691.43. The delegate also imposed 5 administrative penalties for the contraventions of the *Act* pursuant to section 29(1) of the *Employment Standards Regulations*, for a total amount owing of \$18,191.43.
4. CWC contends that the delegate erred in law and failed to observe the principles of natural justice. He further submits that evidence has become available that was not available at the time the Determination was being made.
5. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards 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 appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUE

6. Whether the delegate erred in law in concluding that Mr. Johal was an employee and entitled to wages.
7. Whether the delegate failed to observe the principles of natural justice in arriving at his conclusion.
8. Whether evidence has become available that was not available at the time of the Determination that would have led the delegate to a different conclusion on a material issue.

FACTS

9. When filing his complaint, Mr. Johal provided the Employment Standards Branch with a copy of his 2006 and 2007 T-4 statements showing wages earned, two copies of his Record of Employment showing CWC as his employer, a letter from CWC dated March 27, 2007, signed by Mr. Sangha, referencing a personal injury claim and setting out Mr. Johal's duties and rate of pay, and two letters from CWC, signed by Mr. Sangha, confirming Mr. Johal as an employee and setting out his wages and wage statements from January 2006 to October 2007. Mr. Johal also provided the Branch with a five page handwritten timesheet with a breakdown of all the daily hours he worked and bonuses earned from May to November, 2007. He alleged that he had not been paid regular wages from October 31, 2007 until November 21, 2007. He contended that when he demanded payment from CWC, Mr. Sangha told him that his wages would be used to offset losses allegedly incurred by CWC as a result of incorrectly cut wood.
10. Mr. Johal also contended he had been terminated without just cause and provided the delegate with his version of events surrounding his termination.
11. The delegate attempted twice to contact Mr. Sangha by telephone. After leaving a second message, a Mr. Jordan Sangha from North American Forest Products Ltd. ("NAFP") left a voice mail message for the delegate, advising him that Sukhdev Sangha was away and that Jordan Sangha would be acting on his behalf. In a subsequent telephone conversation, Jordan Sangha advised the delegate that Sukhdev Sangha was in charge of CWC and that it shared the same address as NAFP. The delegate faxed Jordan Sangha the details of the complaint. The following week the delegate mailed a Notice of Mediation meeting to Sukhdev Sangha, scheduling a mediation for May 13, 2009. Mr. Johal attended the mediation meeting but Sukhdev Sangha did not. When the delegate subsequently spoke to Sukhdev Sangha, he acknowledged receiving notice of the mediation session but denied being the owner/operator of CWC. He stated that CWC was no longer in business and refused to provide the delegate with the name of the person who owned or operated it. He further stated that Mr. Johal's issues were between him and his supervisor and refused to discuss those issues any further.
12. The delegate conducted a BC Corporate Registry search on March 25, 2009. It showed that CWC was incorporated on February 12, 1997 and dissolved October 13, 2000. CWC continued to operate as an unregistered proprietorship since that day. Information provided by Mr. Johal showed that the property from which CWC operated was owned by Sukhdev Sangha.
13. On June 12, 2008, the delegate sent Mr. Sangha a letter by both registered and regular mail, summarizing his telephone call and including the corporate search information. Mr. Sangha was provided with an opportunity to dispute the delegate's conclusion that Mr. Sangha controlled CWC during Mr. Johal's employment. He was advised that, in the absence of a response from him, the delegate would proceed with his review of Mr. Johal's complaint.
14. The registered letter was returned to the Branch unclaimed and the letter sent by regular mail was not.
15. On July 4, 2008, the delegate sent Mr. Sangha a demand for Employment Records by registered mail and regular mail. The documents were to be produced by July 21, 2008. The registered letter was returned to the Branch unclaimed and the letter sent by regular mail was not.
16. On September 3, 2008, the delegate sent Mr. Sangha a letter outlining his preliminary findings by registered and regular mail. The letter also set out all the attempts the delegate had made to contact Mr. Sangha. Mr. Sangha was given a final opportunity to pay the amounts noted in the preliminary findings or dispute the

information no later than September 18, 2008. The registered letter was returned unclaimed and the letter sent by regular mail was not.

17. The delegate concluded that Mr. Sangha had been given an opportunity to reply to the complaint under section 77 of the *Act*.
18. The delegate determined that, in the absence of any employer records, he would issue a Determination based on the records provided by Mr. Johal. He found those records to be reliable and consistent with the information Mr. Johal provided and the corporate searches and noted that many of them were provided by CWC itself.
19. The delegate concluded, based on the available records, that CWC was Mr. Johal's employer despite Mr. Sangha's assertion to the contrary. He also determined Mr. Johal's hourly rate of pay and wage entitlement based on those records. The delegate found that Mr. Johal's employment had been terminated without just cause and that he was therefore entitled to compensation for length of service.

ARGUMENT

20. In addition to asserting all three grounds of appeal, Mr. Sangha sets out the following reasons for the appeal:

There is a huge discrepancy in total length of employment of Gurdev Singh Johal and between actual hours worked and hours according to the determination. I require copy of all handwritten hours by Gurdev Singh from Karpal Singh, particularly the hours worked between November 2006 to February 2007. (emphasis in original)

I would like the Tribunal to cancel the determination. Karpal Singh is being biased towards Gurdev Singh. Why would Karpal Singh keep sending mail to the post office when it kept getting returned back to him. I might have not even received this determination had he not sent it via courier delivery service. I don't live at the address he sent it to.

21. The delegate submits that Mr. Sangha has failed to provide sufficient or convincing evidence to substantiate the grounds of appeal. He says that the employer failed to provide details of any discrepancy of the hours worked and is now simply challenging findings of fact made by the delegate. The delegate also says that Mr. Johal did not provide any handwritten hours for work between November 2006 and February 2007. He adds that those hours would not be considered as they were outside the statutory six month time period within which the complaint could be considered.
22. The delegate further submits that the employer was given numerous opportunities to respond to the complaint and failed to do so. The delegate contends that the employer's appeal represents an attempt to re-argue the case on its merits, which is not a proper ground for appeal. The delegate also says that the Determination was not sent by courier, but by registered mail to the same address that all other documents were sent and that Canada Post information confirmed successful delivery of only the Determination. The delegate notes that the address the correspondence was sent to is the address listed on a number of letters sent by the employer to Mr. Johal as well as the Record of Employment.
23. The delegate says that the employer has failed to provide any evidence that he is biased towards him and that this ground of appeal is without merit.
24. Mr. Johal seeks to have the Determination upheld.

25. On May 1, 2009, Mr. Sangha submitted a final response to the Tribunal which contained “further facts relevant to this case”, including a commentary on Mr. Johal’s claim for personal injury benefits. He further submitted that his mailing address was not the one used by the delegate and that the signature on the Canada Post tracking sheet is not his. He asserts that he was away from Canada on the date it was purportedly signed for. Mr. Sangha asserts that the delegate was misled and misunderstood the situation from the beginning.

ANALYSIS

26. 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; or
 - evidence has become available that was not available at the time the determination was being made.
27. Mr. Sangha must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. A disagreement with the result, in and of itself, is not a ground of appeal.
28. Mr. Sangha’s appeal document does not identify any errors of law or why he believes he was denied natural justice apart from the simple assertion that the delegate was biased against him. What CWC seeks, in effect, is a re-hearing of the complaint. An appeal is not an opportunity to re-argue a case that should have been advanced before the delegate.
29. For greater certainty, I will address each ground of appeal in turn.

Error of Law

30. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
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 reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle.
31. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.
32. Mr. Sangha has not demonstrated that the delegate has made a palpable or overriding error. The delegate found Mr. Johal’s records to be reliable and, in the absence of any contrary evidence from the employer,

arrived at a conclusion that is supportable on the record. Mere assertion that the records are incorrect is not a basis for interfering with the delegate's factual findings.

33. I find no basis for this ground of appeal.

Natural Justice

34. Principles of natural justice are, in essence, procedural rights that ensure parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.

35. I find that Mr. Sangha knew about and had the opportunity to respond to Mr. Johal's complaint. The record shows that numerous documents were sent by both registered and regular mail to CWC's address, which was identified in Records of Employment issued by CWC and letters sent by Mr. Sangha. I note also that the address to which the documents were sent was the address used by CWC when it filed a claim in Provincial Court against Mr. Johal for recovery of allegedly damaging products, a claim that was later discontinued. Furthermore, although Mr. Sangha asserts that he did not sign for the Determination sent by registered mail to that address, in the margins of copy of the Canada Post tracking slip, he writes that the Determination "was handed out to me few days later". Although he does not say who handed him the Determination, I find that the address to which the information notifying Mr. Sangha about the complaint and his opportunity to respond was sent to the correct address. As such, I conclude that CWC had knowledge of, and the opportunity to respond to Mr. Johal's complaint.

36. Natural justice principles also include a requirement that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence (the rule against bias). The concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case". (*Valente v. The Queen*, [1985] 2 S.C.R. 673 at p. 685)

37. Although Mr. Sangha asserts that the delegate was biased against him, he puts forward no evidence to support this assertion. In the absence of any evidence that the delegate was biased, I find no basis for this ground of appeal.

New Evidence

38. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 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.

39. None of the information put forward by Mr. Sangha meets the test for new evidence set out above. Having failed to participate in the investigation process, Mr. Sangha cannot now advance "new evidence" as a basis for an appeal.

40. I dismiss the appeal.

ORDER

41. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated February 25, 2009, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal