

An appeal

- by -

Your Gift Source Inc., William Koby also known as Bill Koby, a Director or Officer of Your Gift Source Inc. and Cory Koby also known as Cory Jacob Koby, a Director or Officer of Your Gift Source Inc.

(the “Appellants”)

- 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 Nos.:** 2006A/33, 2006A/34 & 2006A/35

**DATE OF DECISION:** May 10, 2006

## DECISION

### SUBMISSIONS

William Koby on behalf of himself and Cory Koby, Directors or Officers of Your Gift Source Inc., and Your Gift Source Inc.

Sharon Cott on behalf of the Director of Employment Standards

### OVERVIEW

1. These are appeals by William Koby and Cory Koby, Directors or Officers of Your Gift Source Inc., and Your Gift Source Inc. (the “Appellants”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against Determinations of the Director of Employment Standards (“the Director”) issued February 3, 2006.
2. Letitia Pengelly worked as an administrative assistant/graphic designer for Your Gift Source Inc. (“YGS”), a wholesale giftware business, from January 16, 2003 until May 31, 2005. Ms. Pengelly filed a complaint alleging that she was owed overtime wages.
3. Following an investigation, the Director’s delegate concluded that YGS had contravened Sections 28, 40, 46, 58, and 63 of the *Act* in failing to pay Ms. Pengelly overtime wages, statutory holiday pay, annual vacation pay and compensation for length of service. She determined that Ms. Pengelly was entitled to wages and interest in the total amount of \$9,948.45. The delegate also imposed a \$2,500 penalty on YGS for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulations*.
4. The delegate determined that Cory Koby, also known as Cory Jacob Koby, and Bill Koby, also known as William Koby, were Directors and Officers of YGS at the time wages owed to Ms. Pengelly were earned and should have been paid. The delegate also issued two separate Determinations against Cory Koby and William Koby in the amount of \$8,035.44 each, representing two months’ unpaid wages, vacation pay and interest.
5. The Appellants contend that the delegate failed to observe the principles of natural justice in making the Determination.
6. This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

### ISSUE

7. Did the delegate fail to observe principles of natural justice in concluding that Ms. Pengelly was owed wages, and in finding William Koby and Cory Koby, as Directors and Officers of YGS, liable for two months unpaid wages, without holding an oral hearing?

## ARGUMENT

8. The reasons given by Mr. Koby for the appeal are, in summary, as follows:
- a disagreement that Ms. Pengelly worked overtime hours in April and May, 2005;
  - the penalty assessments are punitive and unfair, particularly because they were based on findings made without a hearing.

## THE FACTS AND ANALYSIS

9. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
  - (b) the director failed to observe the principles of natural justice in making the determination;  
or
  - (c) evidence has become available that was not available at the time the determination was being made
10. As it does not appear that the Appellants dispute any of the conclusions but for the overtime wages, I have set out the facts relevant to that issue only.
11. Ms. Pengelly claimed overtime wages from August 2, 2004 until May 31, 2005. She provided the delegate with a “vacation record”, printed May 31, 2005, showing a balance of 260.25 overtime hours. The parties agreed that, as of January 31, 2005, Ms. Pengelly was entitled to 178.75 hours of overtime.
12. YGS advised the delegate that in April and May, 2005, Ms. Pengelly was in the office only occasionally to pick up paycheques and personal mail. It contended that Ms. Pengelly worked for 1 ½ days in April and May, the balance being taken as overtime days and vacation days. Ms. Pengelly disputed that, and provided the delegate with computer records of her hours of work during that period. The record contains a computer printout of Ms. Pengelly’s hours of work in April and May. The record indicates that Ms. Pengelly often worked from home, and the printout suggests that much of the work she performed during these two months was done in the evenings and early mornings.
13. YGS’s witness, Melody Dobson, advised the delegate that Ms. Pengelly did not work at all in January, and worked only part of February, but could not say whether she worked in March, April or May.
14. The delegate issued a Demand for Records on August 8, 2005. YGS did not maintain a record of Ms. Pengelly’s daily hours of work. It said that Ms. Pengelly did not provide YGS with timesheets, despite several requests to do so.
15. In the absence of any proper payroll records, the delegate accepted Ms. Pengelly’s computer print out of hours worked. She determined that the hours were maintained contemporaneously, as they recorded the start and end time, as well as comments about work being performed. She also accepted that YGS paid Ms. Pengelly regular wages from April 1 to May 31, 2005. She noted that YGSs’ “vacations” and

“Banked overtime taken” sheets corroborated Ms. Pengelly’s records, except those for April and May, which were noted as “in dispute”.

16. Mr. Koby contends that Ms. Pengelly used up hours in her overtime bank in the months of April and May while still receiving her regular wages. He says YGS has no records of her hours of work for this period because she was not performing any work.
17. The delegate contended that the Determination ought to stand on its merits.
18. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker, and parties alleging a denial of a fair hearing must provide some evidence in support of that allegation. (see *Dusty Investments Inc. dba Honda North* BC EST #D043/99)
19. The Appellants provide no evidence that they were not given a fair hearing. They knew what the allegations were, and were given full opportunity to respond to those allegations.
20. The appellants say however, that credibility is “an important issue” in this complaint and that an oral hearing ought to have been held. I am not persuaded that the delegate’s decision not to hold an oral hearing was a denial of natural justice. (see also *Donald Marlowe operating as Donmar HVAC Services*, BC EST #D037/06). While there was a dispute as to whether Ms. Pengelly worked the hours she claimed she did, the appellants provided the delegate with the name of a witness whom I infer was to corroborate their assertions that Ms. Pengelly did not work those hours in April and May. The witness did not do so. Furthermore, YGS’s own records corroborated Ms. Pengelly’s assertions.
21. The Appellants’ grounds of appeal are, in fact, a disagreement with the delegate’s factual conclusions. 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.
22. I have reviewed the record and am satisfied that the conclusions arrived at by the delegate were rationally supported by the evidence, for the reasons set out above. While it is clear that the Appellants do not agree with those conclusions, an appeal is not an opportunity to re-argue a case that has already been made before the delegate. I find no basis to allow the appeal on these grounds.
23. The Appellants also seek relief from the imposition of the penalties, as they say the business has closed, and the penalties will not serve as a deterrence against further contraventions.
24. Penalties are imposed under subsection 29(1) of the *Employment Standards Regulations*. Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. The amount of the penalty is fixed by Regulation.
25. In *Douglas Mattson* (BC EST #DRD647/01) the Tribunal found that it could not ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on its judgement about what is “fair” or “logical”. Further, in *Actton Super-Save Gas Stations Ltd.* (BC EST #D067/04) the Tribunal concluded that the *Act* provides for mandatory administrative penalties without any exceptions: “The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme.”

26. The evidence is that YGS breached several provisions of the *Act* with respect to wages, statutory holiday pay, annual vacation pay and compensation for length of service. Therefore, I have no basis to allow the appeal on this ground.

### **ORDER**

27. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated February 3, 2006, be confirmed in the amount of \$12,448.45, plus whatever interest might have accrued since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**