

An appeal

- by -

United Specialty Products Ltd.
(“USP”)

- 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: Shafik Bhalloo

FILE No.: 2012A/45

DATE OF DECISION: June 12, 2012

DECISION

SUBMISSIONS

Roger Repay	on behalf of United Specialty Products Ltd.
Diana Douglas	on her own behalf
Chantal Martel	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by United Specialty Products Ltd. (“USP”) against a Determination of the Director of Employment Standards (the “Director”) issued March 26, 2012 (the “Determination”).
2. By way of background, USP operates a business selling specialty chemicals, solutions and services. USP employed Diana Douglas (“Ms. Douglas”) as a Territory Manager commencing March 31, 2010, and terminated her employment for cause on November 17, 2010.
3. On February 7, 2011, Ms. Douglas filed a complaint against USP claiming that the latter contravened the *Act* by failing to pay her compensation for length of service and other wages (the “Complaint”). The delegate of the Director conducted a hearing of the Complaint over the course of two (2) days on June 30 and October 20, 2011 (the “Hearing”). The issues the delegate examined at the Hearing were threefold, namely whether:
 - (i) Ms. Douglas was an “employee as defined under the *Act*”?
 - (ii) If so, is Ms. Douglas owed outstanding wages?
 - (iii) Ms. Douglas was entitled to compensation for length of service?
4. After considering the evidence and submissions of the parties at the Hearing, the delegate went on to conclude, based on the application of the definitions of “employee” and “employer” in the *Employment Standards Act* (the “*Act*”) as well as the common law “four-fold test” (direction and control, ownership of tools, chance of profit and risk of loss and integration) to the work relationship between USP and Ms. Douglas, that Ms. Douglas was an employee of USP and not an independent contractor. The delegate then went on to find, on the basis of the evidence of the parties, that Ms. Douglas was owed \$1,000.00 in wages and one (1) week’s compensation for length of service in the amount of \$500.00. The delegate also concluded that Ms. Douglas was entitled to receive vacation pay on all of her wages and she was due \$418.84 in respect of vacation pay. The delegate also ordered accrued interest on the foregoing amounts, pursuant to section 88 of the *Act*, for a total award of \$1,991.71 to Ms. Douglas.
5. In addition, the delegate levied two (2) administrative penalties of \$500.00 each against USP for contraventions of sections 18 and 63 of the *Act*. USP is appealing the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
6. I also note that in its appeal submissions, USP is asking for the appeal to proceed by way of an oral hearing and is requesting the notes of the delegate who conducted the Hearing because USP claims that there is “a significant disconnect between the evidence presented at the Hearing and the delegate’s version of those facts in the Determination”.

7. In this decision, I will only deal with USP's request for an oral hearing of the appeal and for the notes of the delegate. I also note that I will determine both these issues based on a review of the Determination, the written submissions of the parties, as well as the section 112(5) "record".

ISSUES

8. The two preliminary issues to be decided in this decision are as follows:
- (i) Should USP's appeal proceed by way of an oral hearing?
 - (ii) Should the delegate's notes made at the Hearing be produced to USP or the parties in this appeal?

SUBMISSIONS OF THE PARTIES

9. Roger Repay ("Mr. Repay"), on behalf of USP, is arguing that the delegate's notes at the Hearing should be produced because there is "a significant disconnect between the evidence presented at the Hearing and the delegate's version of those facts in the Determination". Mr. Repay further states that the delegate's notes "would certainly be relevant and helpful in deciding this appeal".
10. With respect to Mr. Repay's request for an oral hearing of USP's appeal, Mr. Repay states that an oral hearing is warranted in this case because of "the overwhelming number of errors on the part of the director's delegate, and the sheer volume of potential evidence".
11. Ms. Douglas, in her submissions, does not address Mr. Repay's request for the delegate's notes from the Hearing, nor does she address Mr. Repay's request for an oral hearing of the appeal. Instead, her submissions relate simply to the substantive merits of the appeal, and I need not, in this decision, reiterate those submissions here.
12. The Director, while not regarding Mr. Repay's request for an oral hearing of USP's appeal, objects to Mr. Repay's request for the delegate's notes from the Hearing. The Director states that the delegate's notes cannot properly be considered part of the record and do not come within the meaning of "record" referred to in section 112(5) of the *Act*. The Director states that the delegate's notes were made by her at the Hearing for her own use, and they were not a verbatim account of the proceedings and were not intended to be an official recording of the proceedings for use by the parties. The Director states that any record or document provided by the parties that the delegate may have considered in the course of the Hearing of the Complaint leading to the Determination forms part of the record and is appropriately disclosed on the appeal.
13. The Director concludes by reiterating that the notes of the delegate do not constitute a "record or a document received from the parties and were not 'before the Director' or 'considered by the Director' as contemplated by the Act". The Director states that they simply were personal notes of the delegate to be used by her as a memory aid only and, thus, not disclosable.

ANALYSIS

14. I will deal with both issues referred to above under separate descriptive headings below.

(i) *Oral Hearing*

15. As indicated, Mr. Repay has requested an oral hearing of USP's appeal. The Tribunal has discretion whether to hold an oral hearing on appeal. Section 103 of the *Act* incorporates, *inter alia*, section 36 of the *Administrative Tribunals Act* ("ATA"), which provides:

Form of Hearing of application

- 36 In an application or an interim or preliminary matter, the tribunal may hold any combination of written, electronic and oral hearings.

16. Rule 17 of the Tribunal's *Rules of Practice and Procedure* ("Rules") provides:

Rule 17 Type of Appeal Hearing

- (1) Provided the procedures described in Parts 6 to 8 of these rules are completed and the appeal has not been dismissed under rule 11(3) or 12, the tribunal will choose a type of hearing for deciding the appeal. The tribunal may choose to have:
- (a) a written submission hearing;
 - (b) a telephone conference call hearing;
 - (c) an in-person hearing; or
 - (d) any combination of the above.
- (2) Usually, the appeal hearing will proceed as a written submission hearing.
17. Having reviewed Mr. Repay's submissions on behalf of USP and particularly his reasons for requesting an oral hearing of USP's appeal- "the overwhelming number of errors on the part of the director's delegate, and the sheer volume of potential evidence"- I am not convinced that an exception to the usual written submission hearing in favour of an oral hearing is necessary in this case. For the most part, Mr. Repay's complaint about the "overwhelming number of errors on the part of the delegate" is his or USP's disagreement with the delegate's findings or conclusions of fact and interpretation of the law, which is not, in my view, sufficient to warrant an oral hearing of the appeal. Further, the volume of evidence in this case is also not such as to warrant an oral hearing. In my view this appeal can be adjudicated on the basis of the section 112(5) "record", the written submissions of the parties and the Reasons for the Determination and therefore, an oral hearing will not be conducted in this matter.

(ii) *Delegate's Hearing notes*

18. With respect to USP's request for the delegate's Hearing notes, the Tribunal does not customarily order production of the notes or other documents created by the Director's delegate. Delegates, in their adjudicative capacity at the hearing, make notes for themselves during the course of proceedings. Such notes are made to refresh their memories and remind themselves of their reaction to certain evidence; they tend to be personal aide mémoires rather than a transcript of the proceedings. Such notes inevitably involve personal reactions, fleeting judgements and frank comments made at the moment, to be reviewed at the end of the hearing as part of the decision-making process. In my view, there is no more justification for parties to examine such notes than there is for examining a judge's notes or initial drafts of reasons for decision or court judgements (see *Lockerbie & Hole Industrial Inc.*, BC EST # D071/05). Such a requirement would simply result in no notes being taken by delegates, to the detriment of the quality of decision-making. In my view, if ever the Tribunal were to order production of a delegate's personal notes made at a hearing it would most certainly be a rare and very unique occasion.

19. Having said this, in this case, the only reason USB has requested the delegate's notes is because Mr. Repay claims that there is "a significant disconnect between the evidence presented at the Hearing and the delegate's version of those facts in the Determination". Upon closer reading of the Reasons for the Determination (and without deciding the appeal on its merits), it appears that the "disconnect" in evidence Mr. Repay is referring to is his or USP's disagreement with the delegate's conclusions or findings of fact based on the evidence adduced at the Hearing. In my view, this most certainly does not qualify as a rare or unique occasion warranting disclosure or production of the delegate's hearing notes and I deny USB's application for the delegate's Hearing notes.

ORDER

20. Pursuant to Section 103 of the *Act*, Section 36 of the *ATA* and Rule 17 of the *Rules*, I order that the appeal will proceed by way of written submission hearing.
21. Pursuant to section 115 of the *Act*, the appellant USP's request for the delegate's Hearing notes is denied.

Shafik Bhalloo
Member
Employment Standards Tribunal