

An appeal

- by -

Jacco Tours (Ontario) Inc.
("Jacco")

- 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.: 2007A/19

DATE OF DECISION: July 10, 2007

DECISION

OVERVIEW

1. The complainant, Winfred Ng (“Ng”) filed a complaint under the *Employment Standards Act* (the “Act”) alleging that his former employer, Jacco Tours (B.C.) Inc. (“Jacco”), contravened the Act by failing to pay him regular wages for the period December 1 to December 12, 2005; annual vacation pay for the period March 1 to December 12, 2005; and compensation pay for the length of service upon termination of his employment (the “Complaint”).
2. The delegate of the Director of Employment Standards (the “Delegate”) held a hearing of the Complaint on June 20, 2006 (“Hearing”). Ng attended at the Hearing on his own behalf and Ronald Tseng (“Tseng”), Jacco’s Chief Financial Officer, and Alberta Law (“Law”), Jacco’s President, attended on behalf of Jacco.
3. The Delegate, after hearing the evidence of Ng, Tseng and Law at the Hearing, issued her Reasons for the Determination on February 1, 2007 (the “Determination”) wherein she found that Jacco contravened Sections 18, 58 and 63 of the Act by failing to pay Ng regular wages in the amount of \$714.12, annual vacation in the amount of \$781.79 and compensation for length of service in the amount of \$470.77 respectively. The Delegate also ordered Jacco to pay accrued interest of \$125.57 on the said amounts pursuant to Section 88 for a total award of \$2,092.25.
4. The Delegate also imposed administrative penalties of \$500 each on Jacco pursuant to Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) for each of the contraventions under Sections 18 and 63 of the Act. The Delegate also imposed a further administrative penalty of \$500 on Jacco for contravening Section 17 of the Act due to Jacco’s failure to pay Ng wages at least semi-monthly and within eight days after the end of the pay period. A final administrative penalty of \$500 was also imposed on Jacco for contravening Section 46 of the Regulation when Jacco failed to comply with the Delegate’s demand for Employer Records which the latter sent to Jacco on May 4, 2006 requiring the latter to “disclose, produce and deliver all employment records” for Ng on or before 4:00 p.m. on May 25, 2006. Jacco, apparently, failed to provide any records for the hours worked by Ng. The total of the administrative penalties amounted to \$2,000.
5. Jacco appeals the Determination on the ground that evidence has become available but was not available at the time the Determination was made. Jacco is also seeking an order suspending the effect of the Determination pending a decision on the merits of the Appeal as well as the cancellation of the Determination. Jacco is not seeking an oral hearing of its appeal and the Tribunal is of the view that an oral hearing is not necessary in order to adjudicate this appeal. Therefore, the Tribunal will determine the appeal based on a review of the Determination, the written submissions of Jacco and the Director, and the Section 112(5) “Record”.

ISSUES ON APPEAL

6. The issues in this appeal are two-fold:
 - 1) Should the Tribunal make an order suspending the effect of the Determination pending the outcome of the appeal?
 - 2) Has new evidence become available that was not available at the time the Determination was made, and if so, what impact does that new evidence have on the results of the Determination?

ARGUMENT

Jacco's Submissions

7. Jacco has made no submissions with respect to its request for the suspension of the Determination pending the outcome of the Appeal.
8. With respect to the “new evidence” ground of appeal, Jacco attaches to its Appeal Form the written submissions of Law, Jacco’s Vice-President (who is identified in the Determination as Jacco’s President). In his written submissions, Law expresses Jacco’s desire “to have more time to collect more evidence and witnesses to ensure a fair trial” and later in the same submissions represents that Jacco has contacted all witnesses and obtained a confirmation from them that they are “willing to participate in (Jacco’s) appeal against Mr. Ng’s claims”. Law also reiterates in the written submissions the evidence he and Tseng presented at the Hearing and expresses Jacco’s desire to specifically call a former employee of Jacco who specifically managed Ng to testify on the subject of Jacco’s vacation policy and Ng’s vacation pay entitlement. Law also indicates in the submissions that the two employees Jacco failed to call at the Hearing to support Jacco’s contention that Ng was dismissed for cause for threatening and slandering them, had now been contacted by Jacco and are “willing to participate in (Jacco’s) appeal against Mr. Ng’s claims”.

Ng's Submissions

9. Ng, in response to Jacco’s written submissions, argues in his written submissions dated March 22, 2007 (“Ng’s First Submission”) that Jacco is essentially repeating the “same story” on appeal as what it presented at the Hearing on the material issues. However, Ng goes on to conclude in his submissions “I am willing to have a fair trial if Jacco Tours has new evidence and witnesses for this case.”

Director's Submissions

10. The Director, in response to Jacco’s submissions, states in her written submissions dated March 9, 2007 (the “Director’s First Submission”) that Jacco was advised in the Notice of Complaint Hearing dated May 4, 2006 to bring any of its witnesses or to have them available at the Hearing as well as to “identify all person(s) intended to be brought as witness(es) and provide a brief summary of the general evidence and that will be presented by each.”

11. The Director further submits, in respect of Jacco's desire to present on appeal the evidence of Ng's former manager, that there "is obviously no reason why (the former manager) could not have been found in time for the Complaint Hearing". It is the Director's contention that Jacco is simply attempting to enter the evidence of the former manager that it could have entered at the Hearing in the first instance, as there is no evidence of the latter's unavailability at the Hearing.
12. On the material issues of compensation for length of service and Jacco's attempt to recover or off-set monies allegedly owed to Jacco by Ng against Ng's vacation pay which Jacco is raising in its appeal, the Director meticulously reviews the Determination and references specific parts of the Determination that show that Jacco presented evidence at the Hearing on these matters and the Delegate dealt with these issues. Accordingly, the Director submits that Jacco is simply attempting to "retry" the matter contrary to the principals enunciated by the Tribunal in *Tri-West Tractors Ltd. BC EST #D 268-96* which, *inter alia*, held that the Tribunal "will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process".

Final Submissions of the Parties

13. The Tribunal forwarded to Jacco Ng's First Submission and the Director's First Submission on April 4, 2007 and afforded Jacco an opportunity to make a final reply no later than 4:30 p.m. on April 20, 2007. In response, Law on behalf of Jacco, in his letter to the Tribunal dated April 12, 2007 requested an extension of time to file Jacco's final reply to April 27, 2007 as Jacco was sending its representative (from its Ontario office, presumably) to British Columbia to "make contact with all the witnesses involved" (presumably to assist Jacco in preparing a final reply). The Tribunal obliged and allowed Jacco an extension of time to submit its final reply by 4:30 p.m. on April 27, 2007. Jacco, however, missed the extended time limit for filing its final reply as it submitted its final reply three days later on April 30, 2007 without any explanation for the delay.
14. In its late filed final reply, Jacco sets out, in some detail, the evidence it wishes to rely upon in the appeal to support its earlier position at the Hearing that Ng was terminated by Jacco for cause, and also provides evidence on the other material issues such as vacation pay and monies allegedly owed by Ng to Jacco. Jacco further delineates the names of the specific witnesses it intends to call in support of its position on appeal on each of the material issues. While I do not think it necessary for me to delineate the particulars of the evidence Jacco intends to rely upon and identify the witnesses Jacco wishes to call to support its evidence on appeal in light of my decision on the issue of the admissibility of Jacco's "new evidence" below, I have very carefully considered that evidence.
15. Ng, in a further written submission to the Tribunal ("Ng's Second Submission"), in response to the Tribunal's decision to allow Jacco an extension to file its final reply to April 27, 2007, questions the motivation of Jacco in asking for an extension and expresses a concern that Jacco, in seeking an extension to file its final reply, may be trying to transfer its assets to another company and go bankrupt with a view to avoiding paying Ng the award made in the Determination.
16. Jacco, in response to Ng's Second Submission, filed a response on May 1, 2007 which response is out of time as the deadline for a final reply for Jacco expired on April 27, 2007. While I do not wish to consider Jacco's late reply to Ng's Second Submission, it should be noted that both Ng's Second Submission and Jacco's response thereto are irrelevant to the issues on appeal. Jacco, in its reply, is simply defending the reputation of Jacco as a financially viable company and challenging Ng's remarks in Ng's Second Submission as "pure nonsense".

17. The Director also submitted a late reply to Jacco's final reply on May 2, 2007. While I do not intend to consider the Director's late reply, it really does not add much more to the Director's First Submission as it repeats the Director's argument previously that there is no evidence that could not have been presented at the Hearing but in context of the evidence in Jacco's final reply.

ANALYSIS

(i) *Suspension of the Determination pending the outcome on Appeal*

18. Section 113 of the *Employment Standards Act* provides:

The Director's determination may be suspended

- 113 (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.
- (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
- (a) the total amount, if any, required to be paid under the determination, or
 - (b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal."

19. The burden is on Jacco to persuade the Tribunal in this case that the Determination should be suspended pending the outcome on appeal. However, Jacco has not made any submissions beyond simply ticking off the box in the Appeal Form asking for a suspension of the Determination pending the outcome on appeal.

20. In *Re Lowan (c.o.b. Corner House)*, BC EST #D253/00, the Tribunal stated with respect to applications to suspend determinations pending appeal:

"The Tribunal will not suspend determinations pending appeal as a matter of course. Even where a determination is suspended, it should be noted that the entire amount of the determination will be ordered to be posted as security unless a smaller amount is 'adequate in the circumstances of the appeal'."

21. In this case, in addition to not making any submissions with respect to its application to suspend the Determination, Jacco has not posted the entire or any part of the amount awarded to Ng in the Determination with the Director. Moreover, I am not satisfied that Jacco's appeal has *prima facie* or any merit. Accordingly, Jacco's request for an order suspending the effect of the Determination pending a decision on the merits of its appeal is refused.

(ii) *New Evidence*

22. With respect to Jacco's ground of appeal under Section 112(1)(c) of the *Act*, the Tribunal in *Re Merilus Technologies Inc.*, BC EST #D171/03 set out four conditions that the appellant must meet or establish before new evidence will be considered:
1. 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;
 2. The evidence must be relevant to a material issue arising from the complaint;
 3. The evidence must be credible in the sense that it is reasonably capable of belief, and
 4. The evidence must have high potential of probative value, in the sense that, if believed, it could own its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
23. As indicated by this Tribunal in *Bloomberg Bio-Technology Development Ltd. (c.o.b. Pioneer Sprouts)*, BC EST #D037/07, the four criteria in *Re Merilus Technologies Inc.*, *supra*, are a conjunctive requirement and therefore Jacco must satisfy each of them before this Tribunal will admit the "new evidence" proffered by Jacco in its appeal.
24. Having reviewed all of Jacco's submissions on appeal, I am not satisfied that Jacco has met the first criterion in the *Merilus* test. That is, Jacco has not discharged the burden on it to show that the evidence on the material issues contained in its submissions on appeal could not, with the exercise of due diligence, have been discovered and presented to the Delegate during the investigation or adjudication of the Complaint and prior to the Determination being made. Jacco has also not given any explanation of why it did not call at the Hearing of the Complaint any of the numerous witnesses it now wishes to rely upon in support of its appeal submissions.
25. It is apparent that Jacco is dissatisfied with the result in the Determination and as a consequence is seeking a complete re-examination of the Complaint by seeking out more evidence to supplement what was already provided to the Delegate during the Complaint process or could have been provided to the Delegate before the Determination was made. As indicated by the Tribunal in *Tri-West Tractor Ltd.*, *supra*, the purpose of the appeal provision in Section 112 is not to afford the appellant a complete re-examination of the complaint or to use the appeal procedure "to make the case that should have been given to the delegate during the investigative process." In the circumstances, the witnesses and the evidence that Jacco is now seeking to rely upon in its appeal is not "new evidence" within the meaning of section 112(1)(c) of the *Act*. As Jacco has failed the first of the four conjunctive requirements for adducing "new evidence", I need not examine the balance of the criteria. Accordingly, Jacco's Appeal is dismissed.

ORDER

26. Pursuant to Section 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.
27. I further confirm the Determination relating to the four administrative penalties of \$500 each against Jacco.

Shafik Bhalloo
Member
Employment Standards Tribunal