

An appeal

- by -

Raj Automotive Group Inc. carrying on business as Atlas Transmissions
(the “Employer”)

- 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: Yuki Matsuno

FILE No.: 2008A/30

DATE OF DECISION: May 28, 2008

DECISION

SUBMISSIONS

Gerard Rajakaruna

for the Employer, Raj Automotive Group Inc. dba Atlas Transmissions

Greg Brown

for the Director of Employment Standards

OVERVIEW

1. This appeal concerns a Determination of the Director of Employment Standards (the “Director”) issued February 1, 2008 (the “Determination”). In the Determination, a delegate of the Director (the “Delegate”) determined that the Employer contravened the *Employment Standards Act* (the “Act”) by failing to pay regular wages and annual vacation pay to two employees, Donald Perreault and Ronald Tychynski. The Employer was ordered to pay the employees a total amount of \$2,178.59, inclusive of interest accrued under section 88 of the Act. In addition, the Delegate imposed two administrative penalties of \$500.00 each, pursuant to section 29(1), for contravening sections 18 and 28 of the Act. The total amount payable by the Employer was \$3,178.59.
2. The Employer, Raj Automotive Group Inc. doing business as Atlas Transmissions, now appeals the Determination pursuant to section 112 of the Act. On behalf of the Employer, Mr. Rajakaruna indicates in the appeal form that he believes an oral hearing is necessary. Upon reviewing the file and seeing that no viva voce evidence is required to decide the issues in the appeal, I have determined that I will decide this appeal on the basis of the written materials before me, pursuant to see Section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings under section 103 of the Act and Rule 16 of the Tribunal’s Rules of Practice and Procedure. Before me are the Determination; the Employer’s appeal form and attached submission and documents; the Delegate’s reply submission on behalf of the Director and attached documents; the Employer’s final reply submission; and the record provided under section 112(5) of the Act.

PRELIMINARY ISSUE

3. The Delegate raises a preliminary issue in his submissions. It is stated in the Determination that any appeal to the Employment Standards Tribunal must be delivered to the Tribunal by March 10, 2008. The appeal form was date stamped as having been received by the Tribunal on March 11, 2008. On this basis, the Delegate alleges that the Employer filed a late appeal and that it must give good reasons to extend the appeal period.
4. On behalf of the Employer, Mr. Rajakaruna submits that when he mailed the appeal form to the Tribunal, he was assured by Canada Post that it would reach the Tribunal at noon on March 10, 2008. He submits a letter from Canada Post indicating that March 10 was the delivery date.
5. The envelope in which the appeal form was delivered is postmarked March 7, 2008.

6. In the Tribunal's view, the appeal was filed in a timely manner in accordance with the *Act*. Section 112(2) of the *Act* provides that a person who wishes to appeal a determination to the Tribunal under section 112(1) must "deliver to the office of the tribunal" the appeal and a copy of the written reasons for determination within the appeal period. Section 112(3) establishes the appeal period as being 30 days after the date of service of the determination, if the person was served by registered mail (as was the case here). The *Act* does not define "deliver"; however, section 29 of the *Interpretation Act*, R.S.B.C. 1996, Chapter 238 defines "deliver" as follows:

"deliver", with reference to a notice or other document, includes mail to or leave with a person, or deposit in a person's mail box or receptacle at the person's residence or place of business".

7. Further, the *Interpretation Act* defines "mail" as follows:

"mail" refers to the deposit of the matter to which the context applies in the Canada Post Office at any place in Canada, postage prepaid, for transmission by post, and includes deliver".

8. The Employer's appeal was postmarked March 7, 2008, indicating that on that day it was deposited with Canada Post, postage prepaid. The appeal was "delivered" within the appeal period to the Tribunal, and therefore is not a late appeal.

BACKGROUND

9. The Determination outlines the following background to this appeal. The Employer operates Atlas Transmissions ("Atlas"), an automotive transmission repair shop. Mr. Perreault was employed as a mechanic at Atlas from June 25 to July 7, 2007, while Mr. Tychynski was employed as the manager of Atlas from June 23 to July 30, 2007. Each filed a complaint with the Employment Standards Branch after their employment ended, and had individual hearings of their complaints on November 29, 2007 for Mr. Perreault and on November 28, 2007 for Mr. Tychynski. Mr. Rajakaruna appeared at both hearings on behalf of the Employer. Each employee appeared at his own hearing, and Mr. Tychynski appeared as a witness at Mr. Perreault's hearing. All the parties had an opportunity to submit evidence in the form of testimony and documents to the Delegate in support of their case at the hearings.
10. In the Determination, the Delegate found on the evidence presented at the hearing that Mr. Perreault was an employee of the Employer and was owed wages and vacation pay. He found that the Employer owed Mr. Perreault \$603.70, inclusive of section 88 interest.
11. With respect to Mr. Tychynski, the Delegate found that he was an employee of the Employer. Although Mr. Tychynski claimed that he was owed salary and commission, the Delegate found that he was in fact owed only salary in the amount of \$1,324.35 along with vacation pay and section 88 interest, for a total of \$1,574.89.
12. The Employer appeals the Determination on all three grounds available under Section 112 of the *Act*.

ISSUES

1. Did the Delegate err in law in making the Determination?
2. Did the Delegate fail to observe the principles of natural justice in making the Determination?

3. Should the appeal be allowed on the basis that evidence has become available that was not available at the time the Determination was being made?

ARGUMENT AND ANALYSIS

13. As the party bringing the appeal, the Employer has the burden of showing that the Determination is wrong and should be varied, cancelled, or referred back to the Director.

Error of Law

14. On behalf of the Employer, Mr. Rajakaruna takes objection to the Delegate's findings of fact and asks that the Determination be dismissed. He argues that the Delegate erred when he found that Mr. Perreault and Mr. Tychynski were both employees and owed wages by the Employer. He argues that Mr. Perreault was hired without the Employer's consent and given cash advances, which in the Employer's view disentitled him from being paid his final wages. It is also Mr. Rajakaruna's view that Mr. Tychynski was hired not as an employee, but as a contractor on his own request, and that he should not be given his final wages because he allegedly stole goods and money from the Employer which amounted in value to much more than the amount of his final wages.
15. The Delegate argues in his submission that Mr. Rajakaruna is attempting to reargue the case on its merits and that his appeal is an appeal only on the facts. I agree. The arguments that the Employer raises on this appeal were, on the Employer's own account, brought forward at the hearings. While I understand that the Employer disagrees vehemently with the Delegate's findings of fact, it is not open to the Tribunal to review questions of fact. Questions of law are reviewable by the Tribunal; in this case, however, I find that none of the Delegate's decisions make out an error of law on the test outlined by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area # 12 – Coquitlam)*, [1998] B.C.J. No. 2275.
16. Mr. Rajakaruna's submissions are particularly adamant with respect to the Delegate's finding that wages were owing to Mr. Tychynski in spite of the Employer's allegations of theft. Mr. Rajakaruna points out in his submissions that there is a police investigation and an insurance company investigation currently under way with respect to these allegations, and that it does not make sense that the Employer should have to pay wages to Mr. Tychynski in these circumstances. However, the Tribunal has found that even where there is an allegation of theft, the employer cannot withhold wages which have been earned by an employee; the employer may instead seek a remedy through the criminal or civil courts for restitution: *Park Hotel (Edmonton) Ltd. and Hunters Grill Ltd.*, BCEST #D539/98. In this case, the fact that the theft allegations have been made, and are believed by the Employer, does not relieve the Employer from the obligation to pay Mr. Tychynski his outstanding wages. The civil and criminal courts remain available for the Employer to pursue restitution.

Failure to Observe the Principles of Natural Justice

17. In order to successfully appeal on this ground, a person must prove a procedural defect, amounting to unfairness, in how the Director carried out an investigation or made the Determination. Such procedural defects include failing to inform a person of the case against him or her and not allowing a person an opportunity to respond to a complaint.

18. In this case, Mr. Rajakaruna says that generally, it is a lot to expect people to take a day off work to testify in person at an adjudicative hearing. He says specifically that the Delegate refused to contact one of his employees, a Mr. Fonyo, to testify by teleconference at the hearing (it is unclear which of the two hearings is being referred to). In reply, the Delegate submits that Mr. Rajakaruna did not submit a list of any witnesses before either of the hearings, and had been informed by the Employment Standards Branch that it was important that witnesses attend the hearing in person so they could provide testimony and be cross-examined. The Delegate further says that Mr. Rajakaruna did not request that Mr. Fonyo be telephoned during the hearing, nor did Mr. Rajakaruna ask for an adjournment of the hearing so that witnesses could be called.
19. The record indicates that Mr. Rajakaruna was informed by letter dated October 26, 2007 that parties are to provide “a list of people they intend to call as witnesses with a brief summary of the relevant evidence those witnesses are expected to give.” The record also contains a letter from Mr. Fonyo dated November 26, 2007 which was entered as an exhibit into one or both of the hearings, giving his perspective on the complaints. In my view, even if the Delegate had refused to make a call to Mr. Fonyo during the hearing (and this is far from clear), there was sufficient notice to Mr. Rajakaruna about how to ensure that witness testimony on the Employer’s behalf would be presented at the hearing. Mr. Rajakaruna had ample time to make arrangements for Mr. Fonyo to appear in person, especially since the latter is an employee of the Employer and as such could be given time by the Employer to attend the hearing.
20. Mr. Rajakaruna makes a further general allegation of prejudice or bias on the part of the Delegate and another Employment Standards Officer (the “Officer”) who communicated with him on this complaint. Specifically, the Employer takes objection to the Delegate’s suggestion at one point during the hearing that if the Employer dropped all of its legal actions against Mr. Tychynski, the Employment Standards case would be withdrawn. Mr. Rajakaruna also says that on an occasion where the Officer told him that he had better think of making an offer so both cases could be wrapped up, he felt that the remark was unethical.
21. The suggestions by the Delegate and the Officer with respect to how the Employer could resolve the complaints appear to be typical attempts to settle a complaint, which is within the jurisdiction of delegates of the Director under section 78 of the Act:
- 78 (1) The director may do one or more of the following:
- (a) assist in settling a complaint or a matter investigated under section 76
22. In my view, it was not a procedural error on the part of the Delegate or the Officer to attempt to settle the complaint by suggesting to the Employer how it could be resolved. These suggestions are not evidence of bias. Further, they do not amount to a finding of fault, responsibility or wrongdoing on the part of the Employer.
23. I find that none of these incidents raised by the Employer make out a failure to observe the principles of natural justice.

New Evidence

24. The Employer also appeals on the ground that there is evidence which has become available that was not available at the time the Determination was being made. However, the Employer’s submissions do not

indicate clearly what the new evidence is. The information contained in the submissions appears to be information that was available at the time the Determination was made. I find that there is no new evidence which would be admissible under the test in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BCEST #D171/03.

ORDER

25. Pursuant to Section 115 of the *Act*, I order that the Determination dated February 1, 2008 be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal