Employment Standards TRIBUNAL

An appeal

- by –

Friends of Animals, Inc.
("FAI")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2015A/43

DATE OF DECISION: June 18, 2015

DECISION

SUBMISSIONS

Bob Orabona	on behalf of Friends of Animals, Inc.
Dave Shishkoff	on his own behalf
Jaime Mellott	on behalf of the Director of Employment Standards

OVERVIEW

1. On May 30, 2014, Dave Shishkoff ("Mr. Shishkoff") filed a complaint against Friends of Animals, Inc. ("FAI") under section 74 of the *Employment Standards Act* (the "*Act*") seeking over $20,700 in unpaid wages. On October 8, 2014, a complaint hearing was held before a delegate of the Director of Employment Standards (the "delegate"). Over five months later, on March 13, 2015, the delegate issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons"). The 5-month delay in issuing the Determination was attributable, at least in part, to the fact that an earlier determination (issued January 30, 2015) that named "Friends of Animals", rather that Friends of Animals, *Inc.*, as the employer was cancelled on March 13, 2015, after some sort of investigation or inquiries were undertaken by the Employment Standards Branch.

2. By way of the Determination now under appeal, the delegate awarded Mr. Shishkoff $7,669.52 in unpaid wages and interest earned during the 6-month statutory wage recovery period (section 80). In addition, the delegate also levied four separate monetary penalties (see section 98) against FAI thus bringing the total amount of the Determination to $9,669.52.

3. On March 23, 2015, FAI filed an appeal with the Tribunal seeking to have the Determination cancelled on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see subsections 112(1)(a) and (b)).

4. I am adjudicating this appeal based on the written submissions of the parties and all parties have provided written submissions. In addition, I have also reviewed the subsection 112(5) record that was before the delegate when she made the Determination.

5. In the following sections, I will summarize the findings made in the Determination, set out the grounds of appeal and the relevant evidence and argument with respect to the appeal grounds. I will then set out my analysis, conclusions and final order.

THE DETERMINATION

6. FAI is an animal welfare organization incorporated in Connecticut on February 24, 1978. It appears from the record before me that FAI is not extraprovincially registered to carry on business in British Columbia. Mr. Shishkoff claimed that he was FAI's "Canadian Correspondent", working from his residence, and had been so employed from July 2006 until March 2014 at an hourly wage of $18.50 payable in U.S. currency. He was paid by wire transfer.

7. The delegate addressed two broad issues in her reasons. First, what was the true nature of the relationship between the parties? If Mr. Shishkoff was an independent contractor, rather than an employee, he would not be entitled a wage payment order under the *Act* since the wage protection provisions of the *Act* are only available to "employees" as defined in section 1. Second, if there had been an employment relationship between the parties, the delegate had to determine Mr. Shishkoff's unpaid wage entitlement. In this regard, Mr. Shishkoff advanced claims for, *inter alia*, statutory holiday pay, unlawful wage deductions and compensation for length of service (FAI maintained it had just cause to terminate his services and therefore had no obligation to pay him compensation for length of service even if he had been an employee).

Employee or Independent Contractor?

8. A central issue before the delegate was Mr. Shishkoff's status – while he claimed he was an employee, FAI asserted that he was at all times a self-employed contractor.

9. As recounted in the delegate's reasons, FAI says that it entered into a business relationship with Mr. Shishkoff in 2006 in order "to leverage his ownership and maintenance of an electronic mailing list and website" and that it expected him to "promote [FAI's] message via his online presence" (delegate's reasons, page R2). FAI paid him, upon being invoiced, by wire transfer – Mr. Shishkoff billed an hourly rate plus related expenses including applicable cellular telephone charges. Mr. Shishkoff worked from his home using a computer and cellular telephone provided by FAI. FAI provided task assignments but Mr. Shishkoff set his own hours and was not subject to direct supervision (delegate's reasons, page R3).

10. Mr. Shishkoff, for his part, maintained that he was a FAI employee. Although he had some scheduling flexibility, he was expected to work 20 to 30 hours each week on FAI's affairs. "The [FAI] Executive Director would assign him tasks by email, which included writing, updating websites and organizing events" (delegate's reasons, page R4). He submitted a work report every two weeks. Although he believed that outside work would be "frowned upon", Mr. Shishkoff conceded that he could not recall ever being told that he could not provide similar services to other organizations (FAI, for its part, maintained that there were no restrictions on his ability to undertake "outside work").

11. The delegate principally framed the answer to the question of whether Mr. Shishkoff was an employee or contractor in the following terms (at page R5):

> *The overarching question that must be answered is, "whose business was it?" Put into context, if [Mr. Shishkoff] was acting in the furtherance of his own business interests then he was likely self-employed. Conversely, if [Mr. Shishkoff] was acting in the furtherance of [FAI's] business interests then it is likely that he was its employee.*

12. The delegate then turned to a consideration of a number of factors that are frequently utilized by common law courts to determine if there is an employment relationship including control and whether Mr. Shishkoff had an opportunity to profit or faced a risk of loss. The delegate concluded that she did not have to find whether or not Mr. Shishkoff was obliged to work exclusively for FAI since the latter exercised "a degree of control over [Mr. Shishkoff] that is consistent with an employment relationship" (page R6). The delegate also noted that Mr. Shishkoff, given that he simply billed an hourly rate for his labour, had no risk of loss or opportunity to profit and that the relationship between the parties had a degree of permanency (page R6). The delegate observed that Mr. Shishkoff's duties, being varied and interconnected, rather than of a "single service" nature, suggested an employment relationship and discounted the fact that he issued monthly invoices, rather than being paid a semi-monthly wage. The delegate concluded this latter fact was not particularly relevant since the "actual relationship" was one of employment (page R6). The delegate

concluded: "I find that [Mr. Shishkoff] was an employee of [FAI] and is therefore entitled to the benefit of the Act" (page R6).

Just Cause for Dismissal

13. FAI argued that even if Mr. Shishkoff had been an employee, he was not entitled to any compensation for length of service since it had just cause for dismissal (see subsection 63(3)(c)). In particular, FAI alleged that Mr. Shishkoff's refusal to carry out a lawful direction, and his tone in communicating that refusal, gave it just cause. The delegate recounted FAI's evidence on this point as follows (page R3):

> The relationship between [FAI] and [Mr. Shishkoff] ended when he refused an assignment from the Executive Director. [FAI] submitted an email dated March 21, 2014 in which the Executive Director directed [Mr. Shishkoff] to organize a protest of the Canadian seal hunt at the Chinese embassy in Vancouver. [Mr. Shishkoff] replied that he could not and would not accept the assignment. [Mr. Shishkoff's] reasons were unsatisfactory and he was rude in his communication of them. Both [Mr. Shishkoff's] tone and his excuses were unacceptable and [FAI] terminated his contract.

14. The delegate recounted Mr. Shishkoff's evidence regarding the reason for the termination of his contract as follows (page R4):

> [Mr. Shishkoff] refused to organize the seal hunt protest as requested by the Executive Director because the seal hunt had not yet been scheduled to start and so it would be a wasted effort. Furthermore, [Mr. Shishkoff] did not have the time to organize the protest as the request came on a Friday afternoon for action the following Monday. Finally, [Mr. Shishkoff] had already committed his weekend to care for his partner who was recovering from surgery. When communicating this to the Executive Director [Mr. Shishkoff] felt he could be frank because of their longstanding relationship.

15. Although the delegate ultimately concluded that Mr. Shishkoff "refused a direct order" and "that the tone with which [Mr. Shishkoff] refused the order was disrespectful" (page R9), she also concluded that because this was an isolated incident within a long-standing relationship, it did not constitute a repudiation of the employment contract. Accordingly, she awarded Mr. Shishkoff seven weeks' wages as compensation for length of service ($3,830.82 in Canadian funds).

Other Unpaid Wage Awards

16. The delegate awarded Mr. Shishkoff $463.80 reflecting payment for four statutory holidays within the wage recovery period.

17. Subsection 21(2) of the *Act* states: "An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations." As noted above, FAI paid Mr. Shishkoff by wire transfer in US currency. The delegate's reasons (pages R6-R7) detail her finding that FAI breached subsection 21(2) regarding certain wire transfer fees that Mr. Shishkoff paid:

> [FAI] paid an initial fee to its bank to send the wire transfer and this fee was not deducted from [Mr. Shishkoff's] wages. However, each of the financial institutions that processed the wire transfer *en route* deducted a fee…
>
> It was not [FAI] that deducted the processing fees but [Mr. Shishkoff's] bank. Nevertheless, the cost of paying wages, whether the cost of a bookkeeper, postage or banking fees, is a business cost and cannot be extended to an employee. Therefore, I find that [FAI] unlawfully required [Mr. Shishkoff] to bear the costs of its payroll and is in contravention of section 21(2) of the Act.

The delegate awarded Mr. Shishkoff $140 on this account representing fourteen separate $10 processing fees charged to him by his bank.

18. Finally, the delegate awarded Mr. Shishkoff $3,041.35 on account of vacation pay based on 6% of his wages that became payable during the 6-month wage recovery period.

GROUNDS FOR APPEAL

19. FAI says that the Determination should be cancelled because the delegate erred in law and failed to observe the principles of natural justice in making it (see subsections 112(1)(a) and (b) of the *Act*).

Alleged Errors of Law

20. FAI's "error of law" ground encompasses several separate allegations. As a preliminary matter, I should note that FAI's agent – its operations director, Mr. Bob Orabona – has asked the Tribunal to carefully review "the transcript or recording of the hearing" when considering its various "error of law" grounds. However, it is my understanding that complaint hearings before employment standards officers are not recorded, either by machine or by a court reporter. Indeed, in British Columbia, hearings before administrative tribunals are very rarely recorded. In this case, there is no "transcript" to review. The "record" of the evidence given at the hearing is to be found in the delegate's reasons.

21. First, FAI says that Mr. Shishkoff's complaint should be dismissed in its entirety because he did not have "clean hands"; more particularly, FAI submits that since Mr. Shishkoff, in testimony at the October 8, 2014 complaint hearing, "admitted to not having filed his income taxes with the Canada Revenue Agency", he should not be permitted to "[profit] from the illegal act". FAI also notes that Mr. Shishkoff only asserted that he was an employee after his service contract was terminated and if he had properly filed his tax returns, the entire matter relating to his status could have been sorted out and, as a result, FAI might have been able to avoid any unpaid wage liability.

22. Second, FAI says that the delegate erred in finding that there was an employment relationship between the parties. FAI submits that the delegate inappropriately applied several of the factors that courts have traditionally reviewed when determining if a worker is an employee or independent contractor.

23. Third, and in relation to the subsection 21(2) "business costs" issue, FAI notes that Mr. Shishkoff's invoices were paid by way of wire transfer only because he expressly requested payment in that form. Had FAI mailed his payment through the post, there would not have been any bank charges. FAI's position is as follows:

> As it is agreed that [FAI] did not make any deductions from [Mr. Shishkoff's] payments, it is clear that [FAI] did not contravene section 21(2) of the Act. If at any time [Mr. Shishkoff] was dissatisfied with the cost of the wire transfers, he could have requested to have his payments mailed to him.

24. Fourth, FAI says that if there was an employment relationship, it was lawfully terminated for just cause (namely, insubordination, dishonesty and wilful misconduct) and, accordingly, Mr. Shishkoff was not entitled to any compensation for length of service.

Breach of the principles of Natural Justice

25. Although FAI indicated on its Appeal Form that it was challenging the Determination on the "natural justice" ground, its "Reasons for Appeal" appended to this form do not identify any alleged "natural justice"

breaches. The only allegation that might conceivably raise a natural justice argument is contained in the last paragraph of FAI's 1 ½ page reply submission dated May 22, 2015, and filed electronically on May 26, 2015:

> As a defendant in the October 2014 hearing, [FAI] had to give its defense (argue its position) before hearing the arguments against it. This is unheard of. Further, the delegate has arguably attempted to influence [FAI] into not filing an appeal, failed to timely report [Mr. Shishkoff's] violation of Canadian law and refused to produce the Record of Hearing.

26. Although it not appropriate for an appellant to raise new issues in a reply document, I also note that FAI is not represented by legal counsel and its representative may not have a complete understanding about adjudicative procedures. Nevertheless, there is certainly an element of unfairness in one party raising a matter for the very first time in its final reply document thus foreclosing the respondent parties' opportunity to respond.

FINDINGS AND ANALYSIS

27. The threshold issue in this appeal concerns Mr. Shishkoff's status – if there were no employment relationship between the parties, it follows that the Determination must be cancelled and all of the other issues raised by FAI are, essentially, moot. Accordingly, I will first turn to this issue.

Employee or Independent Contractor?

28. The question of whether an individual is an employee or an independent contractor must be addressed by considering the interrelated statutory definitions of "employee", "employer", "wages" and "work" all found in section 1 of the *Act*. The critical criteria contained in these various definitions include whether the putative employer hired and exercised a measure of control over the individual alleged to be an employee and whether the individual provided paid services to the "employer" of a kind normally provided by an employee. To a degree, common law considerations are also relevant and in this regard the leading authority is the Supreme Court of Canada's decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 SCR. 983 at paras. 47-48:

> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

29. While the parties' purported to structure their relationship as a "contractor" type of relationship with Mr. Shishkoff submitting monthly invoices, the superficial form of the relationship cannot take precedence over the actual substance of the relationship. Mr. Shishkoff worked from his home but he utilized a computer and cellular telephone that FAI provided; FAI reimbursed Mr. Shishkoff for all his FAI-related expenses. He was an integral member of FAI's operations and communicated using an e-mail address with the suffix "@friendsofanimals.org". In various e-mail communications (including e-mail messages from

FAI's president), Mr. Shishkoff was identified as an employee and a member of the FAI staff. In one e-mail, the FAI's president referred to Mr. Shishkoff's "job" with FAI and in another e-mail its operations director noted that Mr. Shishkoff was "working" for FAI". These e-mails also indicate that FAI exercised considerable direction and control over Mr. Shishkoff's activities. He was economically dependent on FAI for his livelihood and there is absolutely no evidence before me that Mr. Shishkoff was operating some sort of "web support" or "public relations" consultancy and that FAI was simply one of many clients. Mr. Shishkoff received an hourly wage (referred to by FAI as his "salary") and had no opportunity to profit nor was he running any risk of loss associated with his work on FAI's behalf.

30. On balance, I am satisfied that the delegate did not err in law in concluding that Mr. Shishkoff was an employee for purposes of the *Act*.

The "Clean Hands" Doctrine

31. FAI says that Mr. Shishkoff's complaint should have been dismissed outright because he "[came] before the Employment Standards Branch with unclean hands". In particular, FAI says that since Mr. Shishkoff apparently never filed any income tax returns with the Canada Revenue Agency during his tenure with FAI in which he reported his income from FAI, this "violation of [the] Canadian tax code", disentitles him to a remedy under the *Act*. FAI also asserts that his claim for unpaid wages "is [for] the same work income that he sort [*sic*] to conceal from the CRC [*sic*]" and that if he had properly reported his income, the question of his status (employee or contractor) could have been resolved at a much earlier point in time with attendant cost savings to FAI.

32. There are several points to be noted with respect to this argument. First, there is no clear evidence in the record before me to indicate whether Mr. Shishkoff did, or did not, report his income from FAI to the Canada Revenue Agency. To the extent that he did not, I am sure that the Canada Revenue Agency will have some questions for Mr. Shishkoff (and for FAI as well since employers are required to deduct and remit income taxes from an employee's pay and also must pay certain amounts on account of employment insurance and Canada pension plan premiums). Further, and with respect to the point about contravening Canada's laws, it would appear that FAI, even though it has been carrying on business in British Columbia for several years, has never extraprovincially registered under either the *Business Corporations Act* or the *Society Act* (it is not clear from the material before me whether FAI would be required to register under the former or the latter statute) even though it seems clear that it is required to register under one of those two enactments.

33. Second, and this flows from the latter point, if Mr. Shishkoff violated Canadian income tax laws, so too did FAI based on its failure to deduct and remit income tax, employment insurance and Canada pension plan contributions on Mr. Shishkoff's behalf. In this event, FAI's hands are no cleaner than Mr. Shishkoff's.

34. Third, there is no evidence in the record before me that FAI advanced this argument before the delegate and thus I query whether it is properly raised, for the first time, on appeal.

35. Fourth, the "clean hands" doctrine is an equitable principle that is potentially relevant where a party is seeking equitable relief from the courts. As noted by the Supreme Court of Canada in *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 SCR 167 at page 188:

> In determining whether the respondents are entitled to equitable relief, it is important not to paint all the respondents with the same brush. As was noted in *Moody v. Cox*, [1917] 2 Ch. 71 (C.A.), at pp. 87-88, "equity will not apply the principle about clean hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for."

In the instant case, Mr. Shishkoff is not seeking equitable relief from the courts. Rather, he seeks an administrative remedy under the wage protection provisions of the *Act* and, in my view, the "clean hands" doctrine is wholly inapplicable. Subsection 76(3) of the *Act* gives the Director of Employment Standards the discretionary authority to refuse to adjudicate a complaint in certain circumstances including where the complaint was not "made in good faith". There is nothing in the record before me to indicate that FAI asked the delegate to dismiss the complaint on this basis – and if that is the case, since the delegate was never called upon to exercise a discretionary statutory power, there is nothing for this Tribunal to review. Further, even if one accepts that Mr. Shishkoff failed to report his income from FAI to the Canada Revenue Agency, I am not satisfied that it necessarily follows that a complaint filed with respect to wages that should have been, but were not, paid constitutes "a claim not made in good faith". I also note that to the extent Mr. Shishkoff failed to report income, it can equally be said that FAI failed to comply with its obligations under the federal *Income Tax Act*.

36. It follows from the foregoing analysis that I see no merit whatsoever in FAI's "clean hands" argument.

Just Cause for Dismissal

37. An employer is not required to pay a dismissed employee any compensation for length of service if there is just cause for dismissal (see subsection 63(3)(c) of the *Act*). FAI says that if Mr. Shishkoff was an employee, his employment was lawfully terminated and, accordingly, the delegate should not have awarded Mr. Shishkoff seven weeks' wages as compensation for length of service (the calculation of the award is not in question, only Mr. Shishkoff's entitlement). In particular, FAI relies on an incident that it characterized as insubordination – "the refusal of an employer's lawful direct order" – as justification for Mr. Shishkoff's summary dismissal.

38. Just cause is simply another term for a breach of the employment contract that is sufficiently serious so as to constitute a repudiation of the contract. The leading Supreme Court of Canada decision regarding just cause is *McKinley v. BC Tel*, [2001] 2 SCR 161, where the court endorsed the principle of proportionality when assessing if misconduct justifies summary dismissal without notice or pay in lieu of notice (paras. 48 and 53):

> In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer…
>
> Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313…

39. Although *McKinley* was a case involving alleged dishonesty, later decisions have confirmed that the "context/proportionality" approach should be applied in all cases of alleged misconduct including insubordination.

40. In the instant case, Mr. Shishkoff suggested, in a March 19, 2014 e-mail, that a protest be organized outside the China embassy in Vancouver. After receiving an encouraging e-mail from FAI's president, Mr. Shishkoff responded on March 20, 2014, with a note in which he suggested "Embarrassing Harper & co by begging China to ban seal products". After receiving a further communication suggesting that a demonstration be organized outside the China embassy, Mr. Shishkoff replied on March 20, 2014, that "there is no way I can

organize something by Monday, unless you'll be happy with on [*sic*] person standing outside the Chinese consulate with a cheap handmade sign…let's be realistic". It seems clear that FOI's president took a dim view of Mr. Shishkoff's reply; she responded saying, among other things: "You are avoiding the work and that doesn't feel right. Work it out on Friday and make Monday or the real opening day a priority. Edita and I are traveling and working 7 days a week lately. We have lives too and can't be doing this work that is yours in Canada. It is not fair." Mr. Shishkoff's reply – and this precipitated his dismissal – was not particularly polite, but to characterize it, as FAI does, as "fraud, dishonesty, serious undermining of the corporate culture and wilful misconduct" is, in my view, simply extravagant hyperbole. I have reproduced Mr. Shishkoff's reply in full, below:

> If it's not starting on Monday, I can't hold a protest to it staring, that's ridiculous [*sic*]…I asked Sheryl from IFAW, and she confirmed it hasn't been announced.
>
> The group you suggested doesn't do protests, they state it explicitly on their site. They only do 'direct action'. I'm not wasting time on that.
>
> I've worked over several weekends lately as well, and am next weekend too. This isn't a competition, nor is it about 'fairness'. But what's not fair is for you to expect me to do this just because you are. If you don't want to work weekends, then DON'T. You can't expect it from others just because you are (and it isn't my working arrangement or contract). I'll do it when I can, but this weekend is not one of them. You can't just hit me with something like this, sorry.
>
> Lesley just got out out [*sic*] of the hospital, and I'm not abandoning her.

41. FAI's president replied the next day: "…Working for [FAI] is different from how you're tackling your job these days. You act like you're a volunteer yet you submit hours each week for reimbursement. We'll decide in April whether your work here is still a fit. And what you do about the seal fur issue this week and going forward is relevant." Shortly, thereafter, Mr. Shishkoff's contract was terminated. I might add that this communication further bolsters Mr. Shishkoff's position that he was an employee rather than an independent contractor given that FAI's president refers to his "job" being at risk and questioning whether his "work here is still a fit".

42. Mr. Shishkoff had nearly eight years' service when he was dismissed and there is nothing in the record indicating that he had any prior disciplinary history. The burden of proving just cause lies on the employer and this single incident, even if one could characterize it as an act of misconduct, did not, in my view, justify the wholly disproportionate response of summary dismissal. The delegate, at page R9 of her reasons, "accepted" that Mr. Shishkoff "refused a direct order" and that "the tone with which [he] refused the order was disrespectful". For my part, I find it hard to characterize Mr. Shishkoff's "refusal" as insubordination and the tone of his communication was certainly no less provocative than the tone of the e-mail missive that precipitated his reply. *Perhaps*, and I would not necessarily even go this far, his refusal might be grounds for some minor discipline. But I certainly do not think given the context of a nearly 8-year tenure apparently unblemished by any prior misconduct, and in light of the entire context of the parties' e-mail stream relating to this matter, and the fact that Mr. Shishkoff felt obliged to attend to his common law spouse who had just been released from hospital following surgery (see section 52), that summary dismissal was a proportionate response. I fully endorse the delegate's conclusion that FAI did not have just cause for dismissal.

Wage Deduction (Wire Transfer Fees)

43. As noted by the delegate in her reasons, FAI did not actually deduct any wire transfer fees from Mr. Shishkoff's pay; his own financial institution levied these charges (page R7). However, under section 20 of the *Act*, an employee's wages must be paid in Canadian currency by way of a bill of exchange drawn on a savings institution. Alternatively, if Mr. Shishkoff agreed, FAI could have paid him by way of a direct

deposit. FAI was obliged to pay Mr. Shishkoff at least semi-monthly (section 17). FAI failed to properly pay Mr. Shishkoff as mandated by the *Act* and that was a choice that it apparently made (even accepting that Mr. Shishkoff was willing to accept payment by way of wire transfers) for its own administrative reasons. I am puzzled as to why the delegate did not penalize FAI relating to its contraventions of sections 17 and 20. In any event, the bank charges that are the subject of this aspect of the wage recovery order were incurred because FAI apparently made a business decision not to pay Mr. Shishkoff in accordance with the *Act*. In essence, it foisted onto Mr. Shishkoff costs that he had to incur because FAI failed to meet its wage payment obligations under section 20 of the *Act*. In my view, these FAI business costs absorbed by Mr. Shishkoff are properly recoverable by him under subsection 21(2) of the *Act*.

Natural Justice

44. As I noted, above, FAI failed to identify any "natural justice" issues in its 5-page "Reasons for Appeal" appended to its Appeal Form. The only conceivable "natural justice" issue that FAI identified was contained in its reply submission. For ease of reference, I have reproduced this argument a second time:

> As a defendant in the October 2014 hearing, [FAI] had to give its defense (argue its position) before hearing the arguments against it. This is unheard of. Further, the delegate has arguably attempted to influence [FAI] into not filing an appeal, failed to timely report [Mr. Shishkoff's] violation of Canadian law and refused to produce the Record of Hearing.

45. The fact that this assertion was advanced, without any prior notice, in a reply submission is reason enough not to address it. That said, since I consider it to lack merit, I will make a few comments regarding this assertion.

46. First, the employer bears the burden of proving just cause whereas the employee bears the burden of proving their unpaid wage entitlements under the *Act*. In terms of presentation order, normally, one would expect the employee to first present their evidence at a hearing and then the employer would be asked to present its evidence. However, on the assumption that FAI did proceed first at the complaint hearing, that fact, standing alone and in the absence of any affirmative evidence as to how that significantly affected the fairness of the adjudicative process, does not constitute a breach of the principles of natural justice.

47. Second, since there was no transcript to be produced (and this is entirely normal for hearings before administrative tribunals in this province), nothing flows from the fact that there was no verbatim "Record of Hearing" (however, the delegate's reasons do constitute a record of the evidence at the complaint hearing).

48. Third, I am not aware of any legal obligation requiring the delegate to become, in essence, an informant for the Canada Revenue Agency. If FAI feels strongly about the matter it is, of course, free to report the matter – and when/if it does, I do not doubt that the CRA will have some pointed questions for FAI as well with respect to its own reporting omissions.

49. Finally, if the delegate did contact FAI and urge it not to appeal the Determination that was a wholly inappropriate message to have been delivered. The material before me includes a letter dated March 13, 2015, from the Director of Employment Standards addressed to both FAI and Mr. Shishkoff in which the Director stated "It is my understanding that you may have received erroneous information from one of my delegates in respect of appeals…neither the Director…nor my delegates should in any way attempt to influence a decision to appeal" and the March 13th letter concluded: "Please accept my personal apologies for any confusion or concern caused by these earlier communications." Had this been a late appeal, I certainly would have given this assertion a good deal of weight in assessing whether an extension of the appeal period should be granted under subsection 109(1)(b) of the *Act*. However, this was not a late appeal and the post-

Determination statement attributed to the delegate, while improper, does not, in my view, constitute a natural justice breach that would justify cancelling the Determination.

ORDER

50. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of $9,669.52, together with whatever further interest that has accrued under section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal