

An appeal

- by -

S.A. Thompson Contracting Ltd.
(“Thompson”)

- 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 No.: 2014A/39

DATE OF DECISION: July 8, 2014

DECISION

SUBMISSIONS

Chris Moore	counsel for S.A. Thompson Contracting Ltd.
Robert Hendricks	on his own behalf
Laine Thormoset	on his own behalf
Jeff Bailey	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), S.A. Thompson Contracting Ltd. (“Thompson”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 28, 2014. In that Determination, the Director found that Thompson had contravened sections 63 and 58 of the *Act* in failing to pay its former employees Robert Hendricks and Laine Thormoset a total of \$23,202.80 in compensation for length of service, annual vacation pay, and interest. The Director also imposed an administrative penalty in the amount of \$500 for Thompson’s contravention of section 63, for a total amount payable of \$23,702.80.
2. Thompson appeals the Determination contending that evidence has become available that was not available at the time the Determination was being made.
3. These reasons are based only on the written submissions of the parties, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Mr. Hendricks and Mr. Thormoset (“the employees”) were employees of Sherby Contracting Ltd. (“Sherby”) when Thompson purchased Sherby’s logging assets in 2011. Sherby did not terminate Mr. Hendricks’ or Mr. Thormoset’s employment or pay them any severance, and neither employee missed any work when Thompson acquired Sherby. The employees were employed by Thompson from July 5, 2011, until December 10, 2013; Mr. Hendricks as a heavy equipment operator and Mr. Thormoset as a heavy-duty mechanic. Upon their termination, Thompson paid them two weeks’ wages as termination pay.
5. On December 18, 2013, the employees filed complaints alleging that Thomson contravened the *Act* in failing to pay them compensation for length of service. They contended that they were entitled to eight weeks’ severance as they had been working for Sherby for more than eight years when Thompson assumed Sherby’s assets and logging operations.
6. During the investigation, Allison Thompson, one of Thompson’s directors, advised the delegate that Thompson was not responsible for Sherby’s failure to pay the employees’ severance and that Thompson would not pay any additional money to either employee.

7. Sherby's previous owner advised the delegate that Sherby ceased its logging operations when it sold its equipment to Thompson and that Thompson agreed to retain the employees at their existing wage and benefit level as part of the sale agreement.
8. The delegate found that because Thompson purchased a substantial part of Sherby's assets and the employment of Mr. Hendricks and Mr. Thormoset was continuous and uninterrupted by the disposition of the assets, Thompson was obliged to pay compensation for length of service pursuant to section 97 of the *Act*.
9. The delegate determined that the employees were entitled to eight weeks' compensation for length of service because they had both been employed by Sherby for more than eight years when Thompson purchased Sherby's assets. The delegate determined that the employees were entitled to six weeks compensation for length of service in addition to the two weeks each had already received.
10. Thompson contends that the delegate made a calculation error in the Determination by failing to account for an additional week of severance paid to Mr. Thormoset. Thompson also says that Sherby paid each of the employees \$3,000 as severance in June 2011. Thompson argues that the quantum of the Determination should be amended to reflect the severance payments made, as well as the vacation pay payable on the severance.
11. Attached to the appeal submissions are pay stubs and copies of cheques for each of the employees which Thompson says it received from Sherby after the Determination was issued. Although the money is identified as a "bonus" payment on the pay stubs, Thompson contends that the money was in fact severance pay because Sherby had no obligation to pay this amount to the employees.
12. The Director submits that the evidence submitted on appeal was not only available at the time the Determination was issued, but that it was considered by the delegate. The delegate says that Sherby confirmed that the \$3,000 bonus was not compensation for length of service but as a "thank you" to the employees. The delegate also says that Allison Thompson confirmed that Sherby had not paid any severance to the employees and had not terminated their employment.
13. Mr. Hendricks and Mr. Thormoset both say that at no time during the sale of Thompson was there any mention of termination or severance by either party to any of the employees. They contend that the money they received from Sherby's in their final pay was a bonus for being valued long-standing employees. They say that Allison Thompson confirmed that the payment was a bonus after a conversation with Sherby's owners.
14. Finally, the delegate submits that the "additional week of severance" paid to Mr. Thormoset was for days missed in the week of December 2013 and was not paid as compensation for length of service.

ANALYSIS

15. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.

16. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
17. I find that Thompson has not met that burden.
18. The Tribunal has established a stringent test for the admissibility of new evidence: (see *Davies et. al*, BC EST # D171/03):
- (a) 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;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
19. The documents Thompson seeks to rely upon were available, with due diligence, during the investigation. However, even if they are considered, I am not persuaded that the material would cause the delegate to arrive at a different conclusion.
20. The Determination found that Shelby did not pay “severance” or compensation for length of service to either employee. Although Thompson now argues that the payment of a bonus should now be characterized as compensation for length of service, that argument has no factual foundation. Thompson has provided no evidence to persuade me that this finding is incorrect.
21. I am not persuaded that the delegate made any palpable or overriding error in making the Determination and that there are no grounds for the appeal.

ORDER

22. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *Act*, the Determination, dated February 28, 2014, is confirmed in the amount of \$23,702.80, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal