

An appeal

- by -

Kevin Chronik
("Chronik")

- 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: Robert Groves

FILE No.: 2009A/024

DATE OF DECISION: June 15, 2009

DECISION

OVERVIEW

1. Kevin Chronik ("Chronik") appeals a determination (the "Determination") of a delegate of the Director of Employment Standards (the "Delegate") dated January 26, 2009. The Delegate determined that Mr. Chronik's former employer, Sean B. McKenzie carrying on business as McKenzie Structural Services (the "Employer"), had contravened sections 45 and 58 of the *Employment Standards Act* (the "*Act*") relating to statutory holiday pay and annual vacation pay, respectively, and that together with interest the sum of \$626.08 was owed to Mr. Chronik. The Delegate also imposed an administrative penalty on the Employer pursuant to section 29 of the *Employment Standards Regulation* in the amount of \$500.00, which brought the total found to be owed to \$1,126.08.
2. I have before me Mr. Chronik's Appeal Form and attached submission, the Delegate's Determination and Reasons for the Determination, a letter submission from the Director dated April 6, 2009, the record the Director says was before the Delegate at the time the Determination was made, a short communication from the Employer dated April 10, 2009, and a final submission from Mr. Chronik dated April 27, 2009.
3. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. No participant has requested any one or more of the particular types of hearing contemplated. My review of the material before me persuades me that I may decide this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

4. Mr. Chronik worked as a concrete grinder for the Employer on the Canada Line project from October 18, 2007 until January 9, 2008, when he was discharged.
5. Following his departure from that position, Mr. Chronik filed a complaint with the Director under section 74 of the *Act*. That complaint generated an investigation which came to encompass several discrete issues arising from the employment relationship. Specifically, the Delegate considered whether the Employer and another entity, Cambie Street Constructors ("CSC") could be said to be associated employers for the purposes of the Determination. She also addressed a disagreement over Mr. Chronik's rate of pay, whether he was an employee or an independent contractor, and whether he was owed regular wages, overtime pay, statutory holiday pay, annual vacation pay, compensation for length of service, and a payment under section 36(1)(b) of the *Act*.
6. In the end, the Delegate determined that the Employer and CSC were not associated employers, that Mr. Chronik's rate of pay was \$20.00 per hour rather than the \$25.75 he claimed, that Mr. Chronik was an employee for the purposes of the *Act* and not a contractor, and that he was owed statutory holiday pay and vacation pay as described above, but that no sums were owed in respect of regular wages, overtime pay, compensation for length of service, or as a result of the operation of section 36(1)(b).
7. It is apparent from Mr. Chronik's submissions on appeal that he does not disagree with several of the conclusions drawn by the Delegate. However, there are aspects of the Determination and references in the

Delegate's Reasons for the Determination with which Mr. Chrunik takes issue, and in respect of which he seeks relief from the Tribunal. I have attempted to summarize them as follows:

- Mr. Chrunik says that there were certain derogatory, and untrue, statements made about his character, habits, and job performance in the Delegate's Reasons which emanated from information received by the Delegate during the investigation, but which the Delegate did not share with Mr. Chrunik before the Determination was made, with the result that Mr. Chrunik had no opportunity to refute them.
- he asserts that the Delegate's findings relating to the amount of wages paid to him by the Employer are incorrect, and that they are based on information from his credit union that was also not made available to Mr. Chrunik before the Determination was made. He states that other evidence he has obtained from his credit union demonstrates that the Delegate gave credit to the Employer for payments to Mr. Chrunik which were not, in fact, received by him.
- he alleges that the Delegate made factual errors which undermine her conclusions relating to Mr. Chrunik's credibility, and warrant a review of the Delegate's finding that Mr. Chrunik was to be paid \$20.00 per hour, rather than the rate of \$25.75 per hour he claimed he had been promised.
- he submits that the Employer and CSC are associated employers for the purposes of the *Act*.

ISSUES

8. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

9. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was being made.

10. Section 115(1) of the *Act* should also be noted. It says this:

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

11. Mr. Chrunik has alleged grounds of appeal which engage sections 112(1)(b) and (c).
12. At its heart, an allegation that the Director failed to observe the principles of natural justice, and therefore contravened section 112(1)(b), raises a concern that the procedure followed by the Director and his delegates

was unfair, most often in the sense that a party was deprived of the opportunity to know the case he is required to meet, and an opportunity to be heard in reply. The obligation to act with fairness is imported expressly, at least in part, into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond. I say "in part" because the plain words of section 77 make it clear that it is referable only to persons who are the subject of an investigation. Its language does not contemplate its being applied to complainants.

13. Decisions of the Tribunal have recognized, however, that while investigations under the *Act* are intended to be summary in nature, and therefore, in general, unfettered by the layers of procedural formalities that mark proceedings in our courts, there is, nevertheless, a broader duty to proceed fairly than that specifically prescribed by section 77 which the Director must often take pains to observe, and which is intended to benefit persons under investigation and complainants alike.
14. In *Inshalla Contracting Ltd.*, BC EST # RD054/06, for example, a reconsideration panel of the Tribunal expressed the view that the Director should provide "those concerned" in an investigation with a reasonable opportunity to "respond to the position of the other party". The panel went on to say that it was a fundamental element of the duty of fairness at common law that prior notice be given "to those entitled to participate in a decision". What will be required by way of reasonable opportunity, or notice, in a given case, will depend on the facts. The panel in *Inshalla* relied on other Tribunal authority to the effect that the Director should, at a minimum, provide an opportunity to the parties to provide information, and to consider and respond to important allegations on critical matters, before issuing a determination (see *Island Scallops Ltd.*, BC EST # D198/02).
15. A good general summary of the fairness principles at play in proceedings involving the Director appears in *Kyle Freney*, BC EST # D130/04. It reads:

The Supreme Court of Canada has repeatedly stated that determining the content of the duty of fairness is a highly contextual exercise. The relevant factors are to be weighed and applied with a view to requiring public bodies to act with courtesy and common sense, in a manner commensurate with the interest at stake, but without imposing unrealistic institutional burdens on the public body: see most recently, *Congregation des temoins de Jehovah v. Lafontaine (Village)* 2004 SCC 48. It is what the English have concisely referred to as "fair play in action".
16. All of this, I suggest, is consistent with purposes of the *Act* identified in sections 2(b) and (d), namely, the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and operation of the legislative scheme.
17. Here, the main basis for Mr. Chronik's natural justice concern is not that the Employer, the party under investigation, was deprived of an opportunity to respond to the substance of his complaint. Rather, he complains that the Delegate made reference in her Reasons for the Determination to allegations of fact adverse to him that had been received by the Delegate during the investigation which the Delegate did not share with him, and which he therefore had no opportunity to address before the Delegate made the Determination.
18. The principal examples of information of this sort with which Mr. Chronik takes issue are communications relating to suspected drug use, his being late for work at times, and poor performance on the job. Mr. Chronik argues that he heard nothing about these allegations during the investigation, and learned of them for the first time when reading the Delegate's Reasons for the Determination. Indeed, prior to this time, he understood that the Employer had discharged him due to his missing work because of an illness, and

for no other reason. As the reasons for the discharge did not figure in any of the relief provided in the Determination, Mr. Chrunik says that the references uncomplimentary to him are irrelevant, in addition to being untrue, and are therefore gratuitous. He says further that the Delegate's including them in her Reasons may cause him embarrassment in future, and perhaps even act as an impediment to future employment. He says they "should be removed from this Determination".

19. In my opinion, Mr. Chrunik has misconstrued the power the Tribunal possesses which enables it to interfere with the actions taken by the Director and his delegates. Clearly, section 115(1)(a) authorizes me to "vary" the Delegate's Determination, if that is warranted having regard to the grounds for appeal set out in section 112. But that is not what Mr. Chrunik is asking me to do. Rather, he asks that I edit the Delegate's Reasons for the Determination, to delete portions unrelated to the substantive result which he considers inappropriate. As I see it, the Tribunal is without jurisdiction to re-word, or strike, passages in a delegate's reasons for a determination.
20. Since the references uncomplimentary to Mr. Chrunik lacked a connection to any of the relief provided by the Delegate in the Determination, the fact that the Delegate did not make Mr. Chrunik aware of those communications prior to making the Determination means that Mr. Chrunik has raised no natural justice concerns relating to them that would justify my interfering with the substantive results incorporated in the Determination itself. I have no doubt that the Delegate included them because they were communicated to her by persons with whom she interacted during the course of the investigation. Having said that, and given that any reasonable person in Mr. Chrunik's shoes would take umbrage at the statements that were made about him, one wonders why the Delegate found it necessary to include them in her Reasons.
21. The other aspect of Mr. Chrunik's submissions on appeal alleging a failure to observe the principles of natural justice relates to the Delegate's discussion of the information she obtained concerning the amounts of the cheques for payment of wages received by Mr. Chrunik from the Employer, and whether Mr. Chrunik received all the cheques that were actually issued in his name. During the course of the investigation, Mr. Chrunik alleged that there were several instances in which he received a payment for wages in an amount that was less than what was noted for the payment in the Employer's records, and in some cases he did not receive the payment at all. The Employer produced cancelled cheques and its bank records supporting its calculation of the amounts paid. Mr. Chrunik said he deposited his paycheques into his account at his credit union. He produced his account records which showed deposits for some payments that were for a lower amount than that noted in the Employer's records, and in some cases no deposit at all.
22. Mr. Chrunik's position before the Delegate was that he had received information from a source within his credit union, whom he did not identify, to the effect that any cheque he presented for deposit would have to be "wholly deposited" in the sense that the sum recorded for deposit on his account record would never be lower than the amount appearing on the cheque, even if Mr. Chrunik had requested that some or all of the amount of the cheque should be paid out to him in cash. Mr. Chrunik provided this information in support of his argument that the records showing deposits into his credit union account reflected the amounts of the cheques he had received for wages from the Employer, which in several instances were lower than the amounts on the cancelled cheques, and the sums recorded in the Employer's account records received from its bank, which had been produced to the Delegate by the Employer for the purposes of assisting the Delegate in her investigation. The inference to be drawn by the Delegate, Mr. Chrunik suggested, was that the Employer's records had been concocted, in whole or in part, after the fact, and with a view to refuting the substance of Mr. Chrunik's allegation that he had not been paid the full amount of the wages he had earned while working for the Employer.

23. After receiving this information from Mr. Chrunik, the Delegate met with a Kim Silva ("Silva"), a financial services manager for Mr. Chrunik's credit union, who told her that a person could present a cheque, deposit some of it, and keep some out as cash, without the full amount of the cheque showing on the person's account records. Ms. Silva also told the Delegate that it was possible for a person to present a cheque and take the entire amount in cash without anything showing on the person's account records. Further, if the Employer had attempted to deposit into his own account some of the cheques made payable to Mr. Chrunik, as the latter was implying, the backs of the cheques would have had to show the endorsement of Mr. Chrunik and would have had different stamp markings. Ms. Silva said that neither of the two cheques Mr. Chrunik indicated he did not receive complied fully with these requirements, and all the cheques provided by the Employer to Mr. Chrunik showed that they had been negotiated through Mr. Chrunik's credit union. In her Reasons for the Determination, the Delegate said that the information received from Ms. Silva provided evidence that it would not have been possible for anyone other than Mr. Chrunik to have cashed the cheques issued by the Employer in his name.
24. Mr. Chrunik has challenged the information received by the Delegate from Ms. Silva, not merely on the ground that it is incorrect, but more importantly for the purposes of my considering his appeal under section 112(1)(b), he objects to the fact that the Delegate never shared it with him prior to making the Determination. I say more importantly because the Delegate's Reasons for Determination state that since the Delegate's own investigation revealed evidence inconsistent with Mr. Chrunik's recollection of how the cheques he received from the Employer were processed, Mr. Chrunik was not a credible witness. This finding adverse to Mr. Chrunik in turn led the Delegate to make other findings against his interest, particularly in the areas of his applicable rate of pay, and whether he was, in fact, owed sums for regular wages.
25. I am of the view that in the circumstances of this case it was incumbent on the Delegate, in order to be deemed to have complied with the principles of fairness I have described, to share the information she had received from Ms. Silva with Mr. Chrunik, and invite a response from him, prior to issuing the Determination. The information received from Ms. Silva was instrumental in convincing the Delegate that Mr. Chrunik's explanations relating to some of the events critical to his complaint were not credible. This conclusion in turn persuaded the Delegate that in other significant areas where Mr. Chrunik's recollection departed from the version of the facts she had received from the Employer, it was the Employer's version that was to be preferred. Those conclusions were fundamental to the Delegate's approach to the resolution of the two principal fact-based issues that Mr. Chrunik had raised – whether he had been paid at the rate of pay to which he said the Employer had agreed, and whether he had actually received and been paid in respect of all the cheques the Employer produced for wages showing Mr. Chrunik as payee.
26. It follows that, at least to this extent, I have concluded the Delegate failed to observe the principles of natural justice in making the Determination.
27. In his submissions delivered for the purposes of this appeal, Mr. Chrunik has appended a letter he obtained from a Sheryl Ries ("Ries"), a branch manager at his credit union, after the Determination was made. The letter from Ms. Ries is addressed to Mr. Chrunik's mother, and indicates that Ms. Ries had the benefit of reviewing the Delegate's Reasons for the Determination, and in particular the Delegate's comments relating to the procedures in place for cashing cheques at Mr. Chrunik's credit union. For our purposes, the important parts of Ms. Ries' letter are these:

In providing you with information that can be forwarded to the Director of Employment Standards, I can confirm that there are a number of different ways we process cheques. In general, we like to see the cheque deposited into the account first – and as a result, new staff are trained to process cheques in this

fashion. However, as noted above, if a member does not want us to process the cheque as a deposit then a withdrawal, we will proceed as requested. And in all cases, we will conduct a review of the account activity to determine whether or not a "hold" would be required. In short, there are many different variables we consider when processing a transaction, and what may be "typical" for one member may be different from (*sic.*) another.

...The determination report referenced the fact that a (*sic.*) "if a cheque was cashed in its entirety nothing would show in the person's account records at all". While it is true that nothing would appear in the member's statements, we do have transaction reports that reflect every single transaction that was processed at the branch. All transactions would appear on this report.

...If you would like us to pull this report to confirm details around the cheque cashing – we will need to know specifics around the date/amount, etc., but would be pleased to look this up for you.

28. Ms. Ries' letter, I discern, is the principal item of "new evidence" to which Mr. Chronik refers in support of his assertion that his appeal should succeed under section 112(1)(c) of the *Act*.
29. The Tribunal's right to allow an appeal based on new evidence under subsection 112(1)(c) incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask whether the evidence 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. In other words, was the evidence really unavailable to the party seeking to tender it? At the same time, even if the evidence was not unavailable in this sense, the Tribunal may nevertheless consider it if the appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon the respondent if it is admitted (see *Re Specialty Motor Cars*, BC EST # D570/98).
30. The Director submits that the evidence from Ms. Ries is not "new" in that it was available to Mr. Chronik at the time the Determination was being made. I accept that this is probably an accurate statement, but I believe it misses the point. Mr. Chronik cannot have felt the need to seek the evidence out, because he was unaware that the Delegate had obtained the evidence of Ms. Silva that appeared to contradict the information he had provided, and which he said he had received from other sources at his credit union.
31. The evidence of Ms. Ries is ambivalent, and therefore inconclusive, in the sense that it appears to support the existence of cheque-cashing practices which validate the information obtained by both the Delegate and Mr. Chronik from Mr. Chronik's credit union. However, the letter makes it clear that the credit union possesses reports that record all transactions at Mr. Chronik's branch, and which would confirm the details surrounding the cashing of cheques within his account. I infer from this that it is highly likely that if the credit union transaction reports are produced, the mystery relating to Mr. Chronik's allegation that he did not receive all the wages the Employer's records indicate he was paid will be resolved. For this reason alone, Ms. Ries' letter is important.
32. I am unaware that the Employer will be prejudiced if I consider Ms. Ries' letter on this appeal, save for the prospect, which will exist in every case where new evidence is relied upon, that the Determination may be altered in a manner that affects the Employer adversely. On its own, such a concern does not, in my view, act as a deterrent to my relying on the letter.
33. In considering whether the appeal should be allowed, at least in part on the strength of the evidence from Ms. Ries, I must say that I am troubled by the fact that Mr. Chronik does not appear to have taken Ms. Ries

up on her invitation, expressed in her letter, to "pull" the relevant transaction reports located at the credit union. A more diligent appellant would have sought disclosure of those records at his earliest opportunity, I would have thought, and if they tended to support Mr. Chronik's version of events, they should have been produced for review on this appeal.

34. I appreciate, however, that Mr. Chronik is a lay person, and the transaction reports are part of the internal records of a third party, his credit union, with which he would be entirely unfamiliar. Moreover, I believe that the Delegate's failure to apprise Mr. Chronik of the substance of the evidence she obtained from Ms. Silva during the course of the investigation is a serious violation of the principles of natural justice on the facts of this case. For these reasons, I am persuaded that the parts of the Determination which can be said to flow from that breach cannot be permitted to stand.
35. As I see it, the relief granted in the Determination arising from the failure to observe the principles of natural justice is restricted to the Delegate's findings relating to Mr. Chronik's rate of pay, and whether he is owed wages, including regular wages, overtime pay, statutory holiday pay, and annual vacation pay. The Delegate's conclusions in all of these areas flowed principally from her finding that Mr. Chronik was not a credible witness, a finding that was based largely, if not exclusively, on the information the Delegate had received from Ms. Silva, which she did not share with Mr. Chronik. Regarding these items, the Determination, I believe, must be cancelled and referred back for further investigation, in the expectation that the failure to observe the principles of natural justice will be cured, the relevant records of Mr. Chronik's credit union obtained, and the questions surrounding the amount of wages actually paid to Mr. Chronik resolved convincingly.
36. Mr. Chronik also takes issue on this appeal with the Delegate's characterization of some of the information he provided to her during the investigation and her apparent reliance on at least one witness whose evidence relating to Mr. Chronik's rate of pay he says is unreliable because it is hearsay. On the view I have taken of the way in which I should dispose of this appeal, I do not feel it necessary to delve into these items in detail, or at all.
37. Finally, Mr. Chronik challenges the Delegate's finding that the Employer and CSC were not common employers, essentially on the basis that there was no evidence of common control and direction of the two companies, and that the Employer was a merely a subcontractor of CSC on the construction project where Mr. Chronik worked. Mr. Chronik argues that the Delegate had information before her which did, on the contrary, suggest common control and direction. He refers to facts identified by the Delegate herself at various points in her Reasons for the Determination, and specifically that:
- CSC supplied the principal tools employed by Mr. Chronik on the job.
 - CSC "fired" Mr. Chronik, not the Employer.
 - CSC, not the Employer, supplied Mr. Chronik's time records to the Delegate.
38. Section 95 of the *Act* deals with associated corporations. It reads:
95. If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and

- (b) if so, they are jointly and severally liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

39. This provision permits the director to pierce the corporate veil and look beyond the surface structure of business relationships in order to establish whether they are, in reality, separate entities, or but one. The power embodied in section 95 is an exceptional one, and derogates from the analysis normally applied at common law. A finding that separate legal persons are associated is not, therefore, to be made lightly. Indeed, in *Vencorp Enterprises Corp. v. British Columbia (Director of Employment Standards)* SCBC, Vancouver Registry No.A952134, September 24, 1998, the court observed that the predecessor section to section 95 should be strictly construed and any ambiguity should be resolved in favour of exempting separate legal persons from its purview.
40. Whether the Employer and CSC could be said to be acting under common control or direction was essentially a question of fact. It is trite to say that the Tribunal does not review a delegate's findings of fact unless they can be said to amount to errors of law. While there were certainly facts which could have suggested to the Delegate that the Employer and CSC might be associated entities, I am not persuaded that Mr. Chrunik has marshalled evidence sufficient to establish that the Delegate's finding that they did not operate under common control or direction was perverse or inexplicable, or completely unfounded, particularly in light of the stringent requirements of section 95. There was ample evidence from several sources with whom the Delegate communicated that the Employer was subcontracted to CSC on the project, and that it acted in several respects under the direction of CSC, which would have permitted the latter to participate to some extent at least in matters arising at the worksite involving the Employer and its employees, including the basis on which Mr. Chrunik would be permitted to be present there, without CSC's becoming an associated entity under section 95.
41. Mr. Chrunik's appeal on this point must be dismissed.

ORDER

42. Pursuant to section 115 of the *Act*, I order as follows:
- those parts of the Determination which rest on conclusions that the Employer and CSC were not associated for the purposes of section 95 of the *Act*, that Mr. Chrunik was an employee, that Mr. Chrunik was not entitled to compensation for length of service, that Mr. Chrunik was not entitled to relief under section 36 of the *Act*, and that the Employer should pay an administrative penalty of \$500.00 are confirmed.
 - those parts of the Determination which rest on conclusions relating to Mr. Chrunik's rate of pay, and the amounts owed to him for regular wages, overtime pay, statutory holiday pay, annual vacation pay and interest are cancelled and referred back to the Director for further investigation.

Robert Groves
Member
Employment Standards Tribunal