

An appeal

- by -

Meadow Creek Cedar Ltd.  
(“Meadow Creek”)

- 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.:** 2012A/37

**DATE OF DECISION:** June 19, 2012

## DECISION

### SUBMISSIONS

Daljit Singh Kooner	on behalf of Meadow Creek Cedar Ltd.
Angel Villalobos	on behalf of six respondent employees
Ed Wall	on behalf of the Director of Employment Standards

### INTRODUCTION

1. This is an appeal filed by Meadow Creek Cedar Ltd. (“Meadow Creek”) under section 112(1) of the *Employment Standards Act* (the “*Act*”). Meadow Creek appeals a Determination that was issued by a delegate of the Director of Employment Standards on March 7, 2012, (the “Determination”) together with accompanying “Reasons for the Determination” (the “delegate’s reasons”). By way of the Determination Meadow Creek was ordered to pay the sum of \$49,672.07 in unpaid wages and section 88 interest owed to 64 former employees. Further, and also by way of the Determination, the delegate levied two separate \$500 monetary penalties against Meadow Creek (see *Act*, section 98). Accordingly, Meadow Creek’s total liability under the Determination is \$50,672.07.
2. Meadow Creek filed an application under section 113 of the *Act* to have the Determination suspended pending the outcome of this appeal; however, that application was denied (see BC EST # D053/12 issued on June 5, 2012 by Tribunal Member Roberts). These reasons for decision address the merits of Meadow Creek’s appeal.
3. Meadow Creek seeks a cancellation of the Determination on the grounds that the delegate erred in law, failed to observe the principles of natural justice in making the Determination and, finally, on the ground that it now has evidence that was not available when the Determination was being made (see subsections 112(1)(a), (b) and (c)). Meadow Creek appears to have simply “checked off” each box on the Appeal Form relating to the three statutory grounds of appeal but has not, in its appended 8-page (plus attachments) submission, provided specific information relating to each separate ground of appeal. Rather, Meadow Creek’s submission largely takes the form of a “global” challenge to the Determination and is predicated on a number of assertions including, for example, an assertion that all employees received their earned wages and a suggestion that the delegate was fixated on “harassing” the company and that the employees were determined to see the company shut down (*why* the employees would embark on such a path, particularly when that would appear to be contrary to their own self-interest, is not adequately explained).
4. Despite the rather loosely organized nature of the appellant’s material, and consistent with the Tribunal’s decision in *Triple S Transmission Inc.* (BC EST # D141/03), I will endeavour to identify and consider all of the relevant arguments in the appellant’s material that relate to each of the three statutory grounds.
5. I am adjudicating this appeal based on the parties’ written submissions and in that regard I have before me submissions filed on behalf of Meadow Creek (including the submission appended to its original appeal form and a second “reply” submission), the Director of Employment Standards, and a submission from the Mexican Consul General on behalf of six of the employees who are Mexican citizens. I have also reviewed the section 112(5) “record” that was before the delegate when he issued the Determination.

## BACKGROUND FACTS

6. I understand that Meadow Creek is no longer carrying on active business operations but that it formerly operated a sawmill near Kaslo, British Columbia. In mid-November 2010, a Meadow Creek employee filed an unpaid wage complaint with the Nelson office of the B.C. Employment Standards Branch. Apparently, this complainant sought to keep his or her identity confidential as provided by section 75 of the *Act*. The delegate assigned to investigate the complaint subsequently issued a demand for employment records – as he was entitled to do under section 85 of the *Act* – for payroll information (hours worked and wages paid to each employee) relating to all Meadow Creek employees on the payroll during the previous 6-month period.
7. The delegate's demand for payroll records, issued on February 18, 2011, indicated that the delegate was principally concerned with the payment of statutory holiday pay and overtime pay. During the course of the delegate's investigation, the delegate had several discussions with Meadow Creek's former sawmill manager and with its principal, Daljit Singh Kooner (who now represents Meadow Creek in this appeal). There was an extensive exchange of information between the delegate and Meadow Creek during the investigation and at the point where the delegate believed he had enough information to proceed to the adjudicative phase of his investigation he forwarded a report to Meadow Creek, dated July 8, 2011, in which he set out his preliminary findings. The delegate invited Meadow Creek to respond to his preliminary findings and Meadow Creek's sawmill manager did so by way making a number of handwritten notes on the delegate's letter that was, in turn, returned to the delegate.
8. Upon receipt of the sawmill manager's comments, the delegate advised him that Meadow Creek would have to provide some corroborating documentary support for the position it was advancing. This message was also communicated to Mr. Kooner. Although Meadow Creek indicated that it would be providing documentary support for its position, it never did so and, some time later, the sawmill manager ceased working for the company. In the absence of contrary evidence from Meadow Creek, and based on the information the delegate had in hand, he issued the Determination and his reasons on March 7, 2012. I might add that, for the most part, the delegate's findings were based on Meadow Creek's own documents although, in some instances (particularly where these records were internally inconsistent), the delegate accepted documents provided by the employees (for example, records of their days and hours of work).

## FINDINGS AND ANALYSIS

9. As noted above, Meadow Creek seeks to have the Determination cancelled and relies on all three statutory grounds. Although it has not separately identified its arguments under each ground of appeal, I will try and summarize what I understand its position to be regarding each ground.

### *Alleged Errors of Law*

10. Meadow Creek seemingly suggests that the delegate should not have investigated a confidential complaint and, in any event, should not have extended the investigation beyond this one complainant to include, ultimately, the 64 employees who were named in the delegate's wage payment order. It appears that Meadow Creek is suggesting that the delegate should have refused to consider the original complaint on a confidential basis and only investigate this single complaint if that employee were willing to surrender his or her confidentiality.
11. These arguments are plainly untenable based on the clear language of the *Act*. Complainants have a statutory right to maintain their confidentiality under section 75 and, insofar as the "expansion" of the complaint to include a total of 64 employees is concerned, it must be noted that the Director is not obliged to proceed to

investigate possible breaches of the *Act* only when a specific complaint has been filed. Subsection 76(2) of the *Act* authorizes the delegate to conduct a compliance audit/investigation whether or not a complaint has been filed. I might add that when a complaint raises the spectre of a more widespread contravention (for example, where an employer appears to have systematically failed to pay overtime in accordance with the provisions of the *Act*), the Director *should* expand the scope of his investigation in order to ensure compliance with the *Act* – this latter approach is entirely consistent with the scheme of the *Act* and the Director’s role under this legislation.

12. Meadow Creek also appears to take issue with the delegate’s demand for payroll records relating to the last 6 months of the employees’ tenure. This time frame was in keeping with an employer’s 6-month unpaid wage liability ceiling set out in section 80 of the *Act* and, accordingly, the demand for 6 months’ payroll records was entirely proper.
13. The Determination includes, for many of the employees, payment for hours worked on various statutory holidays. Meadow Creek’s position during the investigation was that no employee worked on a statutory holiday but its own records were inconsistent with that position. On appeal, Meadow Creek appears to be saying that, at least insofar as the Remembrance Day holiday is concerned, that there was some sort of agreement “with employees to move the statutory holiday to November 12” but any such agreement would be void as a contravention of section 4 of the *Act*.
14. Six of the 64 employees named in the Determination were Mexican citizens who were working in Canada under the auspices of the federal government’s Temporary Foreign Worker Program and, more particularly, the Seasonal Agricultural Worker Program (“SAWP”). As is detailed in the delegate’s reasons, at pages R3-R4, these workers were apparently hired through a company known as Can Pacific Farms Inc. (a company in which Mr. Kooner is also a principal) to pick berries at Can Pacific’s blueberry farm in Surrey, B.C. The delegate was advised by Meadow Creek’s sawmill manager that “the Mexican workers were originally hired to pick blueberries, but because the crop was late and the berries were not ripe and the workers wanted to work, they sent them to work at the [Meadow Creek] mill” (delegate’s reasons, page R3). Further, the sawmill manager advised the delegate that, while working at the sawmill, these six workers “were controlled and directed by [Meadow Creek] personnel cleaning and working on the machines bundling and stacking lumber” (delegate’s reasons, page R3).
15. Meadow Creek says that in making an unpaid wage award in favour of the Mexican workers the delegate “has acted beyond the law” because “he has no authority to make determination in the case of Mexican workers” [sic]. Although Meadow Creek’s argument on this point is wholly devoid of any legal merit, it certainly does not fall short on chutzpah. Meadow Creek acknowledges that these workers were working at the sawmill and that they were not paid for their efforts but says that since they were not legally permitted to work at the sawmill, but only at the farm under the provisions of the SAWP, Meadow Creek cannot be held legally responsible for their unpaid wages:

Mexican workers went to work at [the sawmill] voluntarily; they were not induced or aided. Employer has not paid anything to the Mexican workers from [Meadow Creek]...Actually [Meadow Creek] has not paid any wages to the Mexican workers for the voluntary work performed by them at [Meadow Creek].
16. Meadow Creek says that since the Mexican workers were not permitted to work at the sawmill, the Determination, as it relates to these workers, “is ultra virus [sic] and void”. In essence, Meadow Creek admits to having wrongfully employed these workers but then says that its own illegality gives it a complete defence. This argument is plainly absurd. Whether or not Meadow Creek and/or Mr. Kooner violated the terms of the SAWP is wholly irrelevant to the issues properly before me in this appeal. The only relevant issues under

the *Act* with respect to these workers are whether they meet the definition of “employee” (which they clearly do) and provided “work” for the benefit of Meadow Creek (which they clearly did). I might add that the “Confirmation of Offer of Employment” issued under the SAWP specifically states, at page 2: “If you are hiring employees in British Columbia, they will be covered by the provincial Employment Standards Act.” Although I do not doubt that federal government officials charged with the administration of the SAWP may have some pointed questions for Mr. Kooner, the mere fact that these workers were not brought into Canada to work for Meadow Creek does not affect these workers’ ability to claim unpaid wages under the *Act*.

***Alleged Failures to Observe the Principles of Natural Justice***

17. Meadow Creek made the following assertions that seem to suggest that the delegate was, or appeared to be, biased:

The delegate wanted to harass the appellant by imposing a determination, so that appellant closes operations [sic]...The behaviour of the delegate with appellant was like a dictator...

18. Meadow Creek, at another point in the submission appended to its appeal form, makes the wholly unfounded (and probably defamatory) assertion that the delegate was motivated to issue the Determination by a desire to impress his supervisor; there is no place for such spurious allegations in the appeal process.

19. One of the fundamental principles of natural justice is that parties are entitled to a hearing before a neutral adjudicator. In this case, Meadow Creek appears to be implying that bias can be inferred from the simple fact that the Determination went against it but there is absolutely no evidence before me to suggest that the delegate was predisposed against Meadow Creek or was otherwise in some sort of conflict of interest. I think it important to note that, in very large measure, the delegate’s conclusions regarding Meadow Creek’s unpaid wage liabilities were based on Meadow Creek’s own payroll records. Further, the delegate reviewed payroll records relating to 85 employees but issued a Determination in favour of 64; presumably, if the delegate were fixed and determined to find against Meadow Creek “across the board” the Determination would not have been limited to only 64 of the 85 employees. The fact that not all employees were awarded unpaid wages is evidence that the delegate carefully reviewed the records before him and made individualized assessments.

20. It seems clear that on some points there was conflicting evidence and, in these areas, the delegate was obliged to make a finding of fact. The delegate noted in his reasons that, in some areas, Meadow Creek’s records were inconsistent and that the employees’ own records were independently corroborated and otherwise appeared to be reliable and accurate. The delegate did not err in law or breach the principles of natural justice by preferring, in some instances, the evidence of the employees rather than Meadow Creek’s evidence. The delegate, contrary to the assertions made by Meadow Creek, did not simply reject the sawmill manager’s uncorroborated assertions but, rather, asked for specific evidence to corroborate those assertions and when none was forthcoming, he simply proceeded to determine the matter based on the best evidence available.

21. Meadow Creek also appears to object to the fact that these complaints were investigated rather than being the subject of a complaint hearing where Meadow Creek would have been afforded the opportunity to cross-examine the employees regarding the details of their unpaid wage claims. First, I would note that for most employees, their unpaid wage entitlements were determined based on Meadow Creek’s own records and thus cross-examination would, it seems to me, have been a rather futile exercise. Second, and that being said, it is also true that in some instances the delegate found that Meadow Creek’s payroll records were unreliable and inaccurate and thus he based his decision primarily on these employees’ own records regarding their days and hours worked. In these latter instances, it may be that cross-examination might have assisted Meadow Creek. It is also possible that Meadow Creek’s cross-examination of these employees might have amounted to a

complete waste of time and resources. Either way, under the *Act* an employer does not have an absolute right to an in-person adjudicative hearing with the full panoply of procedures that are typically available in a civil court trial. The Director of Employment Standards is empowered under the *Act* to conduct investigations or to order complaint hearings. In this instance, the Director opted for an investigation and I am unable to say that this decision was unreasonable or amounted to a breach of the rules of natural justice. Having decided to conduct an investigation, the delegate was obliged, under section 77 of the *Act*, to ensure that Meadow Creek was made aware of the substance of its potential liabilities under the *Act* and afforded an opportunity to respond. The record before me clearly shows that the delegate was alive to his obligations under section 77 and fully complied with those obligations.

***Evidence that was not available when the Determination was being made***

22. Meadow Creek appended a number of documents relating to the SAWP program and, presumably, says that these documents constitute “new evidence” within subsection 112(1)(c) of the *Act*. However, for the reasons given above, I find that these documents are not relevant and, in any event, all of the documents were “available” and could have been provided to the delegate if Meadow Creek had wished to do so.

**ORDER**

23. Pursuant to subsection 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued in the amount of \$50,672.07 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**