

An appeal

- by -

World Hockey Association Corp.
("WHA")

- 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: Shafik Bhalloo

FILE No.: 2007A/47

DATE OF DECISION: August 2, 2007

DECISION

OVERVIEW

1. The World Hockey Association Corp. (the “WHA”) is registered in the province of British Columbia as an extra-provincial company and operates a hockey league comprising of six teams. Five of the teams are in British Columbia and one in Washington State. In addition, the WHA also owns and operates a junior “B” hockey team that plays in the Kootenay International Junior Hockey League.
2. In and during 2006 and 2007, Jerry Ellingson-Weir (“Ellingson-Weir”), Traci Schuck (“Schuck”), Lacey Shenton (“Shenton”), Kenneth Southwick (“Southwick”) and Jennifer Tran (“Tran”) (collectively the “Complainants”) were all employed with the WHA in various capacities.
3. In and during December 2006 to March 2007, the Complainants, separately, filed complaints under the *Employment Standards Act*, RSBC 1996 Chap. 113 (the “Act”) against the WHA for outstanding wages and vacation pay (the “Complaints”)
4. The delegate (the “Delegate”) of the Director of the Employment Standards (the “Director”) made several attempts to contact the WHA and advise the latter of the Complaints including her investigation and the requirements of the *Act* and invited a response from the WHA to the Complaints. The WHA, through its CEO and President, Mr. William R. Smith (“Smith”), communicated with the Delegate and provided the Delegate with a very limited response to the Complaints, which the Delegate took into consideration before issuing the Determination on April 25, 2007.
5. The Determination found the WHA to have contravened Sections 8, 17, 18, 21, 58 and 63 of the *Act* with respect to the employment of Ellingson-Weir, Schuck, Shenton, Southwick and Tran and ordered the WHA to pay the Complainants wages, annual vacation pay, compensation for length of service, compensation for cost of doing business, compensation for misrepresentation and accrued interest. The amount of the award against the WHA payable to the Complainants totalled \$20,637.66.
6. The Determination also ordered the WHA to pay four administrative penalties, in the amount of \$500 each, for contraventions of Sections 8, 17, 18 and 21 of the *Act*.
7. The WHA appeals the Determination on two grounds, namely, that evidence has become available that was not available at the time the Determination was made and the Director failed to observe principles of natural justice in making the Determination. The WHA is also seeking an order suspending the effect of the Determination pending a decision on the merits of its Appeal and also requesting the cancellation of the Determination or, alternatively, its change or variation. The WHA is not seeking an oral hearing of its Appeal and the Tribunal is of the view that an oral hearing is not necessary in order to adjudicate this Appeal. Therefore, the Tribunal will determine the Appeal based on a review of the Determination, the Section 112(5) “Record”, and the written submissions of the WHA, the Director and the Complainants.

ISSUES ON APPEAL

8. The issues in this Appeal are three-fold:
 1. Did the Director fail to observe the principles of natural justice in making the Determination?
 2. Has evidence become available that was not available at the time the Determination was being made?
 3. Should the Tribunal make an order suspending the effect of the Determination pending the outcome of the Appeal?

DISCUSSION AND ANALYSIS

(1) Failure to Observe the Principles of Natural Justice

9. While the WHA has appealed on the basis of the Director's failure to observe the principles of natural justice, Smith, in his written submissions on behalf of the WHA, does not clearly articulate WHA's supporting argument on this ground of appeal. The only reference in the written submissions of Smith that may be connected or related to the WHA's natural justice ground of appeal is the following assertion:

The only reason that this has gone as far as it has is that as President of the WHA, I have been travelling extensively since mid March [overseas 5 different occasions] and to Ontario/Michigan which have been in order to save the League & prepare for next season, and could not answer swiftly the emails or calls from Kelowna [A. Clark -Delegate - Employment Standards]. The very first I did receive was when I was traveling on a train from Michigan to Ontario then flying to Quebec, and tried to explain that since our office existed of only 4 people [including myself] & that the office was now closed I was the only PERSON in the entire WHA who could or would handle absolutely every task. No one wants to let claims like this expire & lose by default, but if you knew what has happened you will see that we deserve a chance to defend ourselves vigorously.

10. In response to the WHA's appeal on the natural justice ground, the Director identifies numerous attempts of the Delegate to notify the WHA and its directors and officers of the Complaints and the consequent opportunities the Delegate afforded the WHA and Smith to respond to the Complaints. The attempts of the Delegate to communicate with the WHA may be summarized as follows:
 - (i) On February 7, 2007, a fax from the Employment Standards Branch ("ESB") to Smith requesting the latter to contact the ESB regarding Southwick's complaint.
 - (ii) On February 26, 2007 the Delegate sent correspondence by regular and registered mail to the attention of Smith at the WHA's head office address at 5521 – 192nd Street, Surrey, British Columbia (the "WHA Office Address") delineating comprehensively the particulars of the complaints filed by Southwick and Schuck and requesting for WHA's written response together with employer records pertaining to Southwick and Schuck by Wednesday, March 14, 2007.

- (iii) On March 14, 2007, the Delegate sent a fax to the attention of John D. Briner of John D. Briner Law Corporation, the attorney of record in the Province of British Columbia for the WHA, advising her investigation into the complaints filed against the WHA and requesting the names and addresses of the directors and officers of the WHA.
- (iv) On March 15, 2007, the Delegate sent emails to Smith and two other directors of the WHA, namely Mr. Robert Hull (“Hull”) and Mr. Peter Young (“Young”) at various email addresses including the email address on the WHA’s website attaching her earlier letter of February 26, 2007 wherein she advises of the investigation into Southwick’s and Schuck’s complaints against the WHA for unpaid wages and requesting WHA’s response.
- (v) On March 15, 2007, Smith responded to the Delegate’s email of the same date (referred to in (iv) above) and advised the Delegate that he was returning to British Columbia on “Tuesday” (March 20, 2007).
- (vi) On March 23, 2007, Smith spoke with the Delegate on the telephone very briefly and advised her that he would call her back.
- (vii) On March 24, 2007, Smith sent an email to the Delegate advising, among other things, that he would contact her on Monday, March 26, 2007 “to go over all of the complaints”. However, Smith did not contact the Delegate thereafter and the Delegate’s attempts to contact Smith at the telephone number he provided to her were unsuccessful.
- (viii) On March 29, 2007, the Delegate sent correspondence by regular and registered mail to Smith and the other directors at the WHA’s Office Address delineating comprehensively the complaints of Southwick and Schuck, as well as the new, or additional complaints from Ellingson-Weir, Shenton and Tran. In the same letter, the Delegate enclosed a Demand for Employer Records to the WHA pertaining to all employees of the WHA. In the correspondence, the Delegate advises the WHA, Smith and the other Directors:

If you disagree with the claims, please provide me with your written submission outlining your evidence and argument. As well, please provide me with any additional documentation that may support your claim. If you have witnesses whom you wish me to contact, please provide me with their full names, addresses and telephone numbers. As noted on the Demand for Employer Records, please provide this information no later than Thursday, April 12, 2007, at 12:00 noon.

According to the Canada Post record contained in the Director’s record submitted in the Appeal, the Delegate’s correspondence dated March 29, 2007 was successfully delivered by registered mail to both the WHA’s Office Address in Surrey as well to its corporate office address in Tallahassee, Florida. It should be noted that while Smith, in his email to the Employment Standard Tribunal on June 5, 2007, indicates that the WHA has not operated from the WHA’s Office Address in Surrey since February 2007, Smith’s written submissions on behalf of the WHA dated June 1, 2007 appear on WHA’s letterhead containing WHA’s Office Address in Surrey.

- (ix) On March 29, 2007, the Delegate also sent correspondence of the same date by email to Smith and the latter, on the same date, acknowledged receiving the correspondence via email and advised the delegate that he would speak with her by telephone on March 30, 2007.

- (x) On April 3, 2007, the Delegate received a letter from John D. Briner advising, among other things, that his firm no longer acted for the WHA and was in fact involved in a legal action against the WHA.
- (xi) On April 2, 2007, Smith sent an email to the Delegate advising, among other things, that it is perhaps best for WHA's lawyers to speak to the Delegate. In the same email Smith indicates that the WHA is not disputing Shenton's and Tran's claims for unpaid wages but that the WHA did not ask Shenton or Tran to travel outside of their work and therefore they are not owed anything for their mileage claim. With respect to Southwick, Smith indicates in the email that the "contracts or agreements with Southwick are not valid" because neither he nor the other directors of the WHA executed the agreement with Southwick. Smith also states that it was Mr. Garry Scott ("Scott"), former Vice-President of Operations of the WHA, who hired Southwick and Scott was "fired for theft & misappropriation of funds, and he did not have the power nor approval to hire (or fire) on long term deals." With respect to Ellingson-Weir, Smith, in his email, states that Ellingson-Weir was not an employee of WHA but a volunteer and that when he received a payment from WHA (after he requested to be paid for the work he performed), Ellingson-Weir signed a Release in favour of WHA (which Release incidentally was never produced by Smith or the WHA to the Delegate or in this Appeal).
- (xii) On April 17, 2007, Smith sent a further email to the Delegate enquiring as to the status of the Complaints and reiterated his previous communication to the Delegate that Southwick's employment agreement was not presented to "the WHA office" or "approved" or shown to him and that Scott did not have the authority to negotiate or sign the agreement with Southwick on behalf of the WHA.
- (xiii) On April 17, 2007, in response to Smith's email (referred to in paragraph (xiii) above), the Delegate emailed Smith (as an attachment to her email) the correspondence dated March 29, 2007 (referred in paragraphs (viii) and (ix) above) which outlined the Delegate's preliminary findings and her request to the WHA to provide evidence in support of its position on the Complaints. The Delegate also pointed out in the same email that she had sought a response from the WHA to the Complaints by Thursday, April 12, 2007, but not received any. The Delegate further pointed out in the email that she would be issuing a determination based on the evidence before her and that she would provide the WHA the opportunity to submit any further evidence for her consideration no later than 4:30 p.m. on the same day (on April 17, 2007).
- (xiv) On April 17, 2007, in response to the Delegate's email referred to in paragraph (xiii) above, Smith reiterated that both Shenton and Tran were entitled to payments, and further added that Schuck is also entitled to payment but not Ellingson-Weir or Southwick. In respect to Ellingson-Weir, Smith reiterated his position that the latter was a volunteer and that his sole involvement with the team was to take players "into his house for a fee of a few hundred dollars a month per player." Smith also questions Ellingson-Weir's last name and why he has two last names, which seems irrelevant to the issues appeal. With respect to Southwick, Smith questions the validity of the contract as Smith did not sign it and further indicates that Southwick was a coach on a month-by-month basis.
- (xv) On April 25, 2007, Smith received a copy of the Determination as evidenced in the Canada Post record contained in the Section 112(5) "Record" submitted by the Director in this Appeal.
- (xvi) On June 4, 2007, the WHA, through Smith, filed its Appeal of the Determination.

11. Section 77 of the *Act* provides:

Opportunity to Respond

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

12. Section 77 of the *Act* effectively delineates the *audi alteram partem* principle, that is, parties to a dispute are entitled to know the case against them and to be heard by, and make submissions, to the decision maker. The Tribunal in *Re J.C. Creations Ltd.* [2003] B.C.E.S.T.D. No. 317, best defined the provision as follows:

Section 77 of the Act requires that the Director "...make reasonable efforts to give a person under investigation an opportunity to respond". **Section 77** is thus a legislated, minimum procedural fairness requirement. It is consistent with the purposes of the Act "to promote the fair treatment of employees and employers" and "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act" (Sections 2(b) and (d) of the Act). The issue here is whether the Director's Delegate made "reasonable efforts" to give the Employer an opportunity to respond to the investigation being conducted by the Delegate.

13. In the case at hand, the Delegate not only made "reasonable efforts" but also, in my view, spared no efforts to inform the WHA of the Complaints and provided the WHA numerous opportunities to respond to the Complaints in a timely fashion prior to issuing her Determination. Moreover, there is ample evidence that WHA, through Smith, was fully apprised of the Complaints, and had plenty of opportunities to respond fully to the Complaints prior to the Determination and indeed responded to the Complaints (albeit not in as detailed a fashion as in its appeal later) by way of Smith's emails of March 24, April 2 and April 17, 2007 to the Delegate.

14. In the circumstances, the Delegate satisfied the basic requirements of section 77 and there is, in my view, no basis for the WHA to complain against the Director under the natural justice ground of appeal and I, therefore, reject WHA's appeal on this ground.

(2) New Evidence

15. The second ground of WHA's appeal is that new evidence has become available that was not available at the time the Determination was made.

16. In *Re Merilus Technologies Inc.*, [2003] B.C.E.S.T.D. No. 171, (27 May 2003), BC EST # D171/03, the Tribunal, on the subject of accepting new evidence on appeal, indicated that it should be guided by the test applied in civil courts for admitting fresh evidence on appeal and went on to delineate the following four-fold criteria for accepting new evidence in appeal proceedings before the Tribunal:

- (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.

17. This Tribunal in *Re Bloomberg Bio-Technology Ltd.* [2007] B.C.E.S.T.D. No. 37, (15 May 2007), BC EST # D037/07 indicated that the criteria for accepting new evidence in *Re Merilus Technologies Inc.* is conjunctive and therefore the party requesting the Tribunal to admit new evidence must satisfy each of the criterion before the Tribunal will admit the new evidence.
18. In the case at hand, I have carefully reviewed Smith's lengthy appeal submissions on behalf of WHA. While I do not think it is necessary for me to identify or particularize each and every submission of WHA here, the submissions may be summarized in a general fashion as follows:
- (i) Submissions relating to an indictment or criticism of both the Delegate and Shenton pertaining to their communication with one another during the Delegate's investigation when Shenton was assisting the Delegate to locate Smith;
 - (ii) Submission relating to an indictment or criticism of Shenton's behaviour and allegations of impropriety on the part of Shenton for allegedly making claims about Smith's poor financial status and his financial and business dealings;
 - (iii) Submissions relating to allegations of improprieties on the part of Reighardt Van Enter ("Van Enter"), one of the directors of the WHA who allegedly hired the Complainants;
 - (iv) Submissions explaining that the WHA has been a victim of a massive fraud (by a party or parties unidentified in the submissions) and that the WHA is a party to a countersuit in the United States of America and it should be allowed, first, to see that litigation to trial without any further drain on its resources;
 - (v) Submissions relating to the hiring of Southwick, his performance as a hockey team coach, his "sketchy" past and the circumstances relating to his transfer to Ontario;
 - (vi) Submissions reiterating the WHA's position during the Delegate's investigation that both Tran and Shenton were entitled to payment; and
 - (vii) Submissions reiterating the WHA's position that Elingson-Weir was a volunteer and not an employee;
19. Having carefully reviewed Smith's submissions on behalf of the WHA, the submissions referred to in paragraphs (vi) and (vii) are clearly not new submissions and simply a reiteration of the WHA's previous submissions in the emails of Smith to the Delegate during the latter's investigation of the Complaints.
20. As for the balance of the submissions in the WHA's appeal (paragraphs (i) to (v) inclusive), the WHA has failed to give a satisfactory or any explanation of why it could not have, with the exercise of due diligence, discovered and presented to the Delegate this evidence during the investigation or adjudication of the Complaints and prior to the Determination being made. There is also nothing in the WHA's evidence in the appeal submission that strikes me as unavailable to the WHA at the time of the Delegate's investigation and before the Determination was made. In my view, the WHA has, without any justification, failed to advance all of its evidence or facts before the Delegate during the investigation and prior to the Determination being made despite being provided numerous opportunities by the Delegate to do so. Accordingly, I am not satisfied that any of the submissions or evidence adduced by the WHA in its appeal satisfies the first criterion in the *Merilus* test for accepting new evidence.

21. While I need not go further and review the evidence of the WHA in relation to the rest of the *Merilus* criteria, I would like to briefly point out that the WHA's submissions in paragraph (i) to (v) above are also not relevant to the material issues in the Complaints and furthermore, even if the evidence in question were believed, I am not at all convinced that the said evidence would have led the Director to a different conclusion.
22. In the circumstances, I reject the WHA's ground of appeal based on section 112(1)(c), namely, that new evidence has become available that was not available at the time the Determination was being made.
23. Having said that, I also wish to point out that one of the many important purposes of the employment standards legislation is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act", as set out in Section 2(d) of the *Act*. The Tribunal in *Re Mitch Dudoward* [2003] B.C.E.S.T.D. No.194, (16 June 2003) BC EST # D194/03 elaborated further on this purpose and provision in the *Act* when it stated:

In my view, this means that there should be timely and efficient resolution of employment disputes. A number of appeal decisions have set out that the time for an appellant to make his or her case, is at the time of the investigation or hearing, before the Delegate. The Tribunal exists primarily to correct errors that were made by the Delegate during the investigation or hearing process. Generally, the failure of a party to advance an issue, evidence or facts before a Delegate, may lead to a result which is unsatisfactory to one of the parties, but that failure is not an error of the Delegate. Different facts can lead to different results in an adjudicative process. There must be some finality to a litigation process, otherwise it would be open to any unhappy party to re-litigate the result of an adverse Determination, by seeking to address fresh evidence after an unfavourable adjudication decision

24. This passage could not hold truer or more applicable than in this case. As previously indicated, the Delegate afforded ample opportunity to the WHA to make a full response to the Complaints but the WHA failed to take advantage of that opportunity as it did not make a full disclosure of all the facts it now wants to rely upon. The time for the WHA to present all its evidence was during the Delegate's investigation when the WHA's representative, Smith, was in contact with the Delegate. To allow the WHA to rely on additional evidence contained in its appeal submissions (which apparently was available during the investigation of the Director and before the Determination was made) is contrary to the stated purpose of the *Act* in Section 2(d)-fairness and efficiency.

(3) *Suspension of the Determination Pending the Appeal*

25. The WHA has sought an order suspending the effect of the Determination pending the outcome of its Appeal.
26. Section 113 of the *Act* provides:

Director's determination may be suspended

- 113** (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.
- (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either.
- (a) the total amount, if any, required to be paid under the determination, or

(b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.

27. This Tribunal, previously, has unequivocally indicated that the burden is on the appellant to persuade the Tribunal that the Determination should be suspended pending the outcome on appeal. However, in this case, the WHA has not made any submissions beyond simply checking off the box in the Appeal Form asking for a suspension of the Determination pending the outcome on Appeal. Furthermore, there is absolutely no indication that the WHA has deposited with the Director any amount required to be paid under the Determination. These facts, combined with my finding that WHA's grounds for appeal are without merit, leads me to unequivocally reject the WHA's application for suspension of the Determination pending the outcome of its appeal.

(4) *Interaction of Shenton with the Delegate*

28. Finally, I note that Smith, in his submissions on behalf of the WHA, has been very critical of the interaction between Shenton and the Delegate in the course of the latter's investigation into the Complaints. I have reviewed all of the correspondence between Shenton and the Delegate and the assistance offered by Shenton to the Delegate in locating Smith and the other directors and officers of the WHA during the investigation. I find no impropriety on the part of either Shenton or the Delegate in their communications with one another and that Smith's allegation of impropriety against them is baseless and without any merit.

ORDER

29. Pursuant to Section 115(a) the *Act*, I order that the Determination be confirmed as issued together with any further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of the issuance of the Determination.
30. I further confirm the Determination relating to the four administrative penalties of \$500 each against the WHA.

Shafik Bhalloo
Member
Employment Standards Tribunal