Employment Standards TRIBUNAL

An appeal

\- by -

Salikan Architecture Inc.
("Salikan")

\- 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.: 2014A/52

DATE OF DECISION: July 17, 2014

DECISION

SUBMISSIONS

Robert Salikan on behalf of Salikan Architecture Inc.

OVERVIEW

1. Salikan Architecture Inc. ("Salikan") appeals a Determination issued against it on March 12, 2014, pursuant to which it was ordered to pay its former employee, Arash Atash ("Atash"), the total sum of $20,278.54 on account of unpaid wages, reimbursement of employment expenses and interest. In addition, and also by way of the Determination, Salikan was assessed $2,000 in monetary penalties (four separate $500 penalties) for having contravened sections 17 (regular payment of wages), 18 (payment of wages on termination of employment), 21 (recovery of business costs paid by employee) and 40 (overtime pay) of the *Employment Standards Act* (the "*Act*"). Accordingly, the total amount payable under the Determination is $22,278.54.

2. The complete appeal was filed one day after the deadline in which to file an appeal. Any delay would allow the Tribunal to dismiss the appeal under subsection 114(1)(b); however, in my view, this appeal has no reasonable prospect of success and, accordingly, I am dismissing it pursuant to subsection 114(1)(f) of the *Act*. I have reached this conclusion after reviewing the Determination and accompanying "Reasons for the Determination" (the "delegate's reasons"), the section 112(5) "record" and Salikan's appeal submissions.

BACKGROUND FACTS

3. Mr. Atash worked for Salikan from May 26, 2008, until his termination on March 31, 2013. At the point of termination his hourly rate was $30. Throughout his employment there was an issue with respect to the timely payment of wages and on termination, his earned wages were not paid in full. Thus, on August 15, 2013, he filed an unpaid wage complaint. This complaint was the subject of a hearing before a delegate of the Director of Employment Standards on January 16, 2014, at which both Mr. Atash and Mr. Robert Salikan (the appellant's principal) attended. Approximately two months later, on March 12, 2014, the delegate issued the Determination and his accompanying reasons.

4. In many critical areas, the evidence before the delegate was not contentious. The delegate made a number of separate findings. First, he determined that Mr. Atash was not a licenced and practising architect (he was an intern) and thus not excluded from the *Act* by reason of subsection 31(a) of the *Employment Standards Regulation*. Salikan does not appeal this finding. Second, the delegate concluded based on the time records before him – again, not seriously in dispute – that Mr. Atash had not been paid all of his regular wages and overtime pay to which he was entitled under the *Act*. Third, the delegate determined that Mr. Atash had not been properly paid for six statutory holidays. Fourth, the delegate determined that Mr. Atash has not been paid all of the vacation pay to which he was entitled. Fifth, the delegate determined that there were some business expenses (totalling $88.55) that had not been reimbursed contrary to section 21 of the *Act*.

THE APPEAL

5. Salikan appealed the Determination on April 22, 2014. The Appeal Form does not indicate which of the three statutory grounds of appeal Salikan is invoking – there is a note on the form from Mr. Salikan that states "I do not know which of these apply". Thus, I will endeavour to deal with each of Salikan's challenges

to the Determination taking into account which of the three statutory appeal grounds is/are most appropriate.

6. Mr. Salikan raised five separate concerns about the Determination. I shall review each in turn.

7. The first challenge to the Determination concerns the overtime pay award. As noted above, Mr. Atash's overtime pay entitlement was calculated in accordance with the provisions of section 40 of the *Act* based on the time records submitted at the hearing. These records were not seriously questioned. Mr. Salikan asserts – as he did before the delegate – that since Mr. Atash was not supposed to work overtime (and some of the projects he worked on were "too small" to justify this added expense), the overtime award should be cancelled. It seems clear that Mr. Salikan was a poor and, at times, distracted, project manager (he essentially concedes as much) and should have taken a much more proactive approach in managing his employee's time. That said, Mr. Salikan was regularly receiving Mr. Atash's time records that showed overtime hours were being worked and overtime is payable when an employer "indirectly allows" overtime hours to be worked. Indeed, the parties appeared to have created an informal "time bank" into which Mr. Atash's overtime hours were recorded. I see no error whatsoever in the delegates' finding (at pages R7-R8 of his reasons) that overtime hours were worked and that Salikan has an unpaid wage liability on this account.

8. Salikan's second challenge concerns the vacation pay award (the delegate calculated Mr. Atash's vacation pay entitlement at $2,998.79). The delegate concluded, at page R10: "After reviewing the payroll records, there is no evidence that vacation pay earned in 2012 and 2013 was ever paid by [Salikan]. I find there is no amount to be deducted [from wages otherwise determined to be payable] for the purposes of paid vacation pay". Mr. Salikan now says that there "was no agreement to pay vacation in the following year". However, this obligation flows from the statute – vacation pay is earned in the previous year and is payable in the current year (see section 58). Mr. Salikan says that, in fact, Mr. Atash was paid vacation pay in the prior year; however, the delegate found no such evidence in Salikan's payroll records and I cannot conclude, based on my review of the record, that the delegate erred in this respect.

9. Salikan's third challenge relates to a credit for wages actually paid during the wage recovery period. The delegate determined, at page R7: "Mr. Atash was terminated on March 31, 2013; therefore, I find the recovery period for outstanding wages is October 1, 2012 to March 31, 2013. In determining whether wages are owed to Mr. Atash, I will calculate total wages earned and payable within the recovery period and deduct amounts paid." I wholly agree with the delegate's approach to the wage recovery period as it is entirely consistent with section 80 of the *Act* and, I note, Salikan does not take issue with this aspect of the delegate's reasons. Salikan's payroll records showed that it paid Mr. Atash $2,640.00 for the period October 1 to 15, 2012, and, by way of seven separate cheques, a further $9,615.00 for the period from October 16, 2012, to March 31, 2013 (see delegate's reasons, page R10). Salikan argued before the delegate, and now advances this same position on appeal, that the latter seven payments were "net" of all required statutory deductions/remittances made on Mr. Atash's behalf and that the "gross amount" was actually $12,316.59. The delegate rejected this position: "There is no evidence to corroborate [Salikan's] assertion, such as a wage statement showing statutory remittances that correspond with each of the seven payments. For that reason I do not accept [Salikan's] assertion that Mr. Atash has been paid $12,316.59 instead of $9,615.00" (delegate's reasons, page R10).

10. Thus, in calculating Mr. Atash's unpaid wage entitlement, the delegate credited Salikan with $12,255 ($2,640 + $9,615) in wage payments during the recovery period rather than the higher figure based on Salikan's position that the seven payments were "net" rather than "gross" payments. Salikan continues to press its point that it paid net rather than gross amounts to Mr. Atash and, accordingly, has not been given full credit for all of the wages it paid to Mr. Atash during the wage recovery period. Mr. Salikan, in the appellant's appeal

submissions, states: "The source deduction of $2,701.59 was paid to CRA on Dec. 9, 2013 along with the required employer's contribution of $890.53, and the confirming T4 slip was provided in advance to the Complaint Hearing. Therefore the gross wage amount of $12,316.59 was paid and in fact confirmed in advance of the hearing." Unfortunately, Salikan – and contrary to its obligations under section 27 of the *Act* – apparently did not issue compliant wage statements to Mr. Atash during his employment and, having reviewed the 129-page record, I find myself in agreement with the delegate's conclusion that there is no affirmative evidence showing that the seven payments made between October 16, 2012, and March 31, 2013, were "net" amounts and that the concomitant deductions/remittances were actually paid to the Canada Revenue Agency to be credited to Mr. Atash's taxation account.

11. I am not, however, prepared to make an affirmative finding that remittances were *not* made. The evidence before me simply does not permit me to make an affirmative finding one way or the other. Salikan's appeal submissions include a copy of a processed cheque dated December 9, 2013, in the amount of $3,592.11 payable to the Receiver General of Canada for "Remittance – Atash payout". This cheque is not contained in the record and was not apparently before the delegate at the January 16, 2014, complaint hearing; nor was it apparently provided to the delegate after the hearing but before the Determination was issued on March 12, 2014. In my view, this document is not admissible as "new evidence" under section 112(1)(c) of the *Act* since it clearly *was* "available at the time the Determination was being made". Further, I am not able to determine from the material before me whether this payment relates to Mr. Atash's unpaid wages earned during the wage recovery period.

12. It seems to me that the best way to address this issue is through a discussion between the Director of Employment Standards and Salikan directly. If the latter can show that it actually has already paid – in the form of remittances on Mr. Atash's behalf to the Canada Revenue Agency – some portion of the Determination amount, those payments can (and should) be taken into account in calculating Salikan's ultimate liability under the Determination.

13. Salikan's fourth challenge relates to so-called "administrative tasks" performed by Mr. Atash. Salikan raised this identical issue before the delegate: "Finally, [Salikan says it] should be permitted to deduct $2,505.00 from wages due to Mr. Atash claiming hours of work for administration services. Mr. Atash was never asked to carry out this service on behalf of [Salikan]." (delegate's reasons, page R6). The delegate concluded, at page R11:

> [Salikan] also argued that no administrative tasks were assigned to Mr. Atash; therefore, the amount of wages to be deducted is $2,505.00. Regardless if Mr. Atash was assigned administrative tasks, there was no dispute he performed this service for [Salikan]. Under the Act time spent by Mr. Atash performing labour or services for [Salikan] is time worked and time for which wages are payable. I find [Salikan] is responsible for paying wages to Mr. Atash for all his administrative services.

14. This issue relating to "administrative tasks" is one that could have been explored through cross-examination at the appeal hearing. Salikan's present position is that some of the duties claimed to have been undertaken were not undertaken and that, in other respects, Mr. Atash's time records may have been inflated. This ground of appeal represents a simple rejection of the delegate's conclusions reached based on the evidence before him at the hearing. The appeal process is not to be used by a party to rehabilitate the case they could have (or should have) advanced at the complaint hearing. To the extent that this ground of appeal is based on an error of law, I can only say that the delegate did not err in finding that this work was properly billable based on the evidence before him; to the extent that Salikan now wishes to rehabilitate its case by adding new evidence through the appeal process, it is estopped from doing so by reason of subsection 112(1)(c).

15. Salikan's fifth and final challenge to the Determination relates to the $500 penalty assessed for its section 21 contravention. Mr. Salikan concedes that he "did not dispute this expense claim" at the complaint hearing (see also delegate's reasons, page R11 – "the parties agree Mr. Atash made a number of purchases for [Salikan] and those business costs have not been reimbursed". Salikan now says, without providing any affirmative proof, that it actually did reimburse Mr. Atash for the expenses in question. I find the evidence tendered in this latter respect to the seriously wanting and, in any event, it is inadmissible under section 112(1)(c). Further, in my view, the delegate could hardly be said to have erred in law in reaching a conclusion that Salikan contravened section 21 when Salikan conceded that very fact at the complaint hearing.

16. In light of my conclusions that each and every one of Salikan's five challenges to the Determination is unmeritorious, I am dismissing this appeal as having no reasonable prospect of success.

ORDER

17. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. Pursuant to subsection 115(1)(a), the Determination is confirmed as issued in the amount of $22,278.54 together with whatever further interest that has accrued under section 88 since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal