

An appeal

- by -

Blue Line Activities Ltd.
(“Blue Line”)

- 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.: 2013A/41

DATE OF DECISION: August 8, 2013

DECISION

SUBMISSIONS

Dragan Ruzic

on behalf of Blue Line Activities Ltd.

INTRODUCTION

1. Blue Line Activities Ltd. (“Blue Line”) has filed an appeal under subsection 112(1)(b) of the *Employment Standards Act* (the “*Act*”) regarding a Determination that was issued on May 14, 2013, pursuant to which Blue Line was ordered to pay a total of \$9,045.85 on account of unpaid wages and section 88 interest owed to two former employees, Daniel Vodola (“Vodola”) and Scott Pickwell (“Pickwell”). In addition, and also by way of the Determination, Blue Line was ordered to pay eight separate \$500 monetary penalties (see *Act*, section 98). Thus, the total amount payable under the Determination is \$13,045.85.
2. The delegate determined that Messrs. Vodola and Pickwell were employees rather than independent contractors and that Blue Line failed to pay them all of their regular wages, overtime pay, statutory holiday pay and vacation pay to which they were entitled. The delegate also determined that each of them was dismissed without just cause and, accordingly, was entitled to compensation for length of service under section 63 of the *Act*.
3. Blue Line says that the Determination should be varied because it was tainted by a breach of the principles of natural justice on the part of the delegate who issued the Determination.
4. The Determination was issued following an investigation by a delegate of the Director of Employment Standards (the “delegate”) who also provided extensive “Reasons for the Determination” (the “delegate’s reasons”) setting out the position and evidence of the parties and her conclusions regarding the two unpaid wage complaints filed by Messrs. Vodola and Pickwell.
5. At this stage, I am adjudicating this appeal based solely on the materials filed by Blue Line in order to determine if this appeal should proceed further or, alternatively, should be dismissed under section 114 of the *Act*. In addition to reviewing Blue Line’s submission, I have also reviewed the section 112(5) “record” (consisting of 222 pages) that was before the delegate when she was making the Determination.

REASONS FOR APPEAL

6. Blue Line, through its president, Mr. Dragan Ruzic, filed a brief submission (appended to its Appeal Form) in the form of a one-page letter. Blue Line says that “both Mr. Pickwell and Mr. Vodola were terminated for theft” (allegedly over \$16,000 in inventory) and that “[t]his is the reason we did not make the payments within the required time, as we did not and still do not feel it is fair that we would need to pay people who had been stealing from their employer”. Although Blue Line maintains that it does not owe the two complainants anything, “it is going to be far more costly for us to continue to incur legal fees and fight these imposed wages than it is to simply settle the account and try to put this behind us”. Accordingly, Blue Line has proposed the following: “We are willing to pay the determined wages owed to the employees but we would like to appeal the administrative penalties that have been assessed. These penalties, which seem to be penalizing us multiple times for the very same act, were incurred as we were working with the RCMP to investigate the theft.”

7. With respect to Mr. Pickwell's claim, Blue Line says that he "was hired as a contract employee and with regards to the fine from Section 46, he chose to work on the stated Remembrance Day".

FINDINGS AND ANALYSIS

8. Blue Line has nominally appealed the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b) of the *Act*). However, Blue Line's submissions do not, in any fashion, raise even a suggestion that the delegate failed to observe the principles of natural justice. There is no suggestion in Blue Line's materials that the delegate was biased or somehow in a conflict of interest, or that she failed to make a reasonable effort to obtain Blue Line's submissions (see section 77; the delegate's extensive efforts to obtain Blue Line's evidence and argument are described at pages R2-R5 of her reasons) and, from my review of her reasons, she carefully considered all the evidence before her prior to rendering a decision.
9. In my view, and taking the most generous view of Blue Line's submissions (see *Triple S Transmission Inc.*, BC EST # D141/03), it is seemingly asserting that the delegate erred in law (subsection 112(1)(a)) in at least four respects. First, Blue Line impliedly argues that the two complainants were terminated for just cause, namely, "theft of inventory" and, in that circumstance, compensation for length of service is not payable (see subsection 63(3)(c)). Second, Blue Line says that the penalties are "overlapping" and accordingly should be cancelled, at least in part. Third, Blue Line seems to be saying that the delegate erred in law in finding that Mr. Pickwell was an "employee" as defined in section 1 of the *Act*; its position is that he was an independent contractor. Fourth, since Mr. Pickwell voluntarily worked on the 2011 Remembrance Day statutory holiday, Blue Line should not have been ordered to pay him premium pay for that day nor should it have been penalized for having failed to do so.
10. I will briefly address each of these alleged errors. With respect to the "theft" allegation, as detailed in the delegate's reasons, this matter was not raised at the outset of the delegate's investigation and I agree with the delegate that there is no credible basis, based on the evidence made available by Blue Line during the course of the delegate's investigation that: a) a theft occurred, and b) even assuming there was missing inventory, that one or both of the complainants was the culprit. Blue Line referenced an "RCMP investigation" but did not give any details concerning the results of that investigation, leading one to conclude that perhaps the RCMP did not find sufficient evidence to recommend a criminal charge, let alone finding evidence that would inevitably result in conviction. I might also note that the two records of employment issued by Blue Line to each complainant identified "leave of absence", not "dismissal", as the reason for issuing the record. Since the delegate correctly determined that there was no just cause for the dismissal of either complainant, both were entitled to compensation for length of service and a \$500 penalty was properly levied against Blue Line for its failure to pay section 63 compensation.
11. The delegate largely based her conclusions on the documents Blue Line submitted. For the most part, it would appear that Blue Line simply was unaware (or indifferent to, one cannot say for certain) of its obligations under the *Act*. Regardless of what might have been the true state of affairs, with respect to the remaining seven \$500 monetary penalties (I have already dealt with the penalty relating to the section 63 contravention), I am satisfied that each one was properly levied. Blue Line conceded: that it failed to pay the complainants at least semi-monthly (it paid wages once a month) contrary to section 17; failed to pay the complainants their unpaid wages within 48 hours after it terminated them (section 18); did not provide wage statement as mandated by section 27 of the *Act*; paid the complainants at "straight-time" rates rather than overtime rates contrary to section 40 of the *Act*; and failed to pay statutory holiday to the complainants for the statutory holidays in question. In regard to the assertion that Mr. Pickwell voluntarily agreed to work the 2011 Remembrance Day statutory holiday – even if that is true, he was nonetheless entitled to be paid

premium pay for the day. Thus, the two penalties levied against Blue Line for having contravened sections 45 and 46 of the *Act* were entirely in order.

12. It would appear that Blue Line is taking the position, at least with respect to Mr. Pickwell, that he was a “contract employee” which I take to mean that he was an *independent contractor* rather than an “employee” (*all* employees have a contract of employment whether or not it might be reduced to writing). This issue was addressed in the delegate’s reasons (for both complainants, at pages R11-R13) and given the evidence before her, in my view, it would have amounted to an error of law if she had concluded the complainants were *not* employees. The evidence before the delegate unequivocally showed that the two complainants were working for, directed by, economically dependent on, using equipment belong to, and essentially treated as employees by, Blue Line.
13. Finally, Blue Line says that it would like to strike a deal whereby it would agree to pay the wages found to be owing to Messrs. Vodola and Pickwell provided the administrative penalties were cancelled. I have no jurisdiction to make such an order. The monetary penalties are mandatory and, since they were correctly levied in accordance with the record of proven *Act* contraventions before the delegate, I cannot simply order that they be rescinded because they “will place a further financial burden on our small business”. The monetary penalties levied in this case constitute over 44% of the total unpaid wage award and that is, no doubt, a significant sum for a small business. On the other hand, the employment standards enforcement scheme in this province is largely predicated on the expectation that employers will voluntarily abide by the requirements of the *Act*; the penalty regime set out in the *Act* was intentionally designed to provide a serious economic incentive for employers to become aware of, and comply with, its provisions.
14. Having considered all of the arguments advanced by Blue Line in its appeal documents, I am fully satisfied that its appeal has no reasonable prospect of success. That being the case, there is no need to request submissions from any of the respondent parties since I am dismissing the appeal under section 114(1)(f) of the *Act*.

ORDER

15. Pursuant to section 115 of the *Act* I order the Determination dated May 14, 2013, be confirmed as issued in the total amount of \$13,045.85 together with whatever additional interest that may have accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal