

An appeal

- by -

Treasures of the Nile Imports Ltd. and Canadian Artistic Design and Décor
Company Ltd. carrying on business as Ancient Arts Gallery and Luxor Home
Furnishings
(the “Companies”)

- 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: Margaret Ostrowski, Q.C.

FILE No.: 2009A/048

DATE OF DECISION: June 29, 2009

DECISION

SUBMISSIONS

Mahmoud Osman	on behalf of the Companies
Muhammad Alsoroghli	on his own behalf
Rod Bianchini	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by the Companies pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 13, 2009. In that decision, the Director ordered the Companies to pay the sum of \$2,304.64 to their former employee Muhammad Alsoroghli (“Alsoroghli”) for overtime of \$1,466.65 pursuant to section 40 of the *Act*, statutory holiday pay of \$97.18 pursuant to section 45 of the *Act*, annual vacation pay of \$83.35 pursuant to section 58 of the *Act*, compensation of \$520.00 for length of service pursuant to section 63 of the *Act*, and \$137.46 accrued interest required under section 88 of the *Act*. The Companies were also required to pay three administrative penalties of \$500 each under section 29 of the *Employment Standards Regulation* for contraventions of sections 40, 45, and 63 of the *Act*.
2. The Tribunal has reviewed the Determination, the submissions of the parties and the section 112(5) record and has determined that a decision can be made without an oral hearing as there are written submissions from the parties setting out their respective cases.
3. Mahmoud Osman (“Osman”) on behalf of the Companies on Appeal Form 1 has appealed the Determination of the Director on the grounds that evidence has become available that was not available at the time the Determination was made and that the Director failed to observe the principles of natural justice in making the Determination. He has also disputed some fact finding of the Director which could raise an error of law by the Director.¹

ISSUE

4. The issues to be determined by the Tribunal are as follows:
 1. Is the evidence that the Companies tendered evidence that was not available at the time the Determination was made and if so, is that new evidence sufficient to justify the Tribunal to vary or cancel the Determination under appeal or to refer the matter back to the Director?
 2. Did the Director fail to observe the principles of natural justice in making the Determination?
 3. Did the Director err in law?

¹ Regarding the adoption of a liberal view of grounds of appeal, I refer to the analysis in *Triple S. Transmission Inc.*, BC EST #D141/03

BACKGROUND

5. The Companies are operated by Osman and carry on the business of retail and wholesale home décor. The Director examined the distinction between the two companies, that is, Treasures of the Nile Imports Ltd. and Canadian Artistic Design and Décor Company Ltd. and reviewed the four conditions that must be met in associating related businesses as “one employer” for the purposes of section 95 of the *Act*. He concluded that the conditions were met for an association of the two companies.
6. Alsoroghli was employed by the Companies as a driver/helper from May 23, 2007 to December 5, 2007. He filed a complaint dated December 27, 2007 stating that the Companies contravened the *Act* by failing to pay regular wages, overtime wages, compensation for length of service, and further claimed that he was not reimbursed for business costs. In the course of the investigation by the Director, it was agreed between the parties that regular wages and reimbursement costs are no longer issues in dispute and that overtime wages, compensation for length of service and statutory holiday pay are in issue. A Determination was rendered on March 13, 2009 and an appeal was signed by the Companies on April 17, 2009.
7. Osman disputes the amount to be paid as overtime by the companies as it was Alsoroghli’s request to work for the two Companies. He further submitted that he had provided a letter in 2008 that the statutory holiday pay had been paid, the \$83.35 annual vacation pay had been paid and received, and the amount of \$520.00 for compensation for length of service should not be paid as Alsoroghli had quit the job and was taken to jail by the police for assault. Osman has submitted an e-mail from Saied El Dalk, the office manager, dated April 17, 2009 in support of his submissions.
8. Alsoroghli submits that he never asked for more working hours and the Companies were not differentiated, that at least one statutory holiday was not paid, that he was fired from work without cause, and that the e-mail submitted as new evidence should not be considered because there was no contact number or address given and he speculated that Osman wrote the e-mail.

ANALYSIS

9. Pursuant to amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are limited to the following as set out in section 112(1):
 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 made.
10. Osman on behalf of the Companies has appealed on ground (b) and ground (c). In his submissions he has also referred to errors regarding certain sums ordered in the Determination to be paid. I will deal with ground (c) first, that is, is there evidence now available that was not available at the time the determination was made that should be considered in this appeal. If I so find, then such evidence can be used in my analysis on the remaining ground. I also will review the errors raised by Osman and assess if they could possibly raise an error of law.

1. New Evidence

- ^{11.} In *Davies et al (Merilus Technologies Inc.)* BC EST #D171/03, the Tribunal set out the following test regarding the ground for “new evidence”:

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions: (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.

- ^{12.} I adopt the test set out in the above decision as a reasonable statement of a standard to follow in the analysis of whether to accept the newly tendered evidence.
- ^{13.} The evidence tendered by the Companies as new evidence, that is, the e-mail dated April 17, 2009 from Saied El Dalk the office manager, was submitted after the date of the Determination. There was no explanation given by Osman why such evidence was not available before the rendering of the Determination. Accordingly I find that on this count, this new evidence fails to meet a condition for the admission of new evidence and accordingly cannot be considered. Furthermore, even if I did consider the substance of this evidence, I take note of the Director’s submission that Osman was given a letter dated March 19, 2007 by the Director that there was an intention to pursue association of the Companies under section 95 of the *Act* and Osman was given an opportunity to respond. Furthermore, although there is a short description of an altercation between the office manager and Alsorgohli resulting in the office manager calling the police, there is no further evidence such as a police file number and information as to whether a charge was laid which would corroborate his view of this event. Alsorgohli has alleged he was removed by police because his employer described him as a trespasser. It would be difficult to find this e-mail to be conclusive evidence in favour of the Companies.

2. Failure to Observe Principles of Natural Justice

- ^{14.} Natural justice requires that parties have an opportunity to know the case against them, and it includes the right to be heard by an unbiased decision maker who has heard the evidence, and the right to receive reasons for the decision. The onus is on the appellant who has alleged a breach of natural justice to persuade the Tribunal on a balance of probabilities that there was a denial of natural justice.
- ^{15.} I have reviewed the submissions of Osman carefully and find no evidence of such a breach of natural justice and there is no evidence that Osman on behalf of the Companies has been denied a chance to defend his case in a fair manner.

3. Errors of Law

- ^{16.} Osman has submitted arguments as set out in paragraph 7 above regarding errors in the Determination findings with respect to the amounts of \$97.18 for statutory holiday pay, \$520.00 for compensation for length of service, and \$83.35 for annual vacation pay. The *Act* does not provide for an appeal based on errors of fact and the Tribunal does not consider such appeals unless such findings raise an error of law (*Britco Structures Ltd.*, BC EST #D260/03). The Tribunal has adopted the following definition of “error of law” set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. No. 2275 (B.C.C.A):
1. a misinterpretation or misapplication of a section of the *Act*;
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not be reasonable be entertained; and
 5. adopting a method of assessment which is wrong in principle.
- ^{17.} In looking closely at the arguments by Osman in regards to the errors he highlights, I see no reason to view such alleged errors of facts as errors of law as the evidence provided in the Determination was duly considered and given weight accordingly. It is not exactly clear what letter Osman was referring to but a letter signed by Alsoroghli on January 3, 2008 was not accepted by the Director to be a testament that Alsoroghli agreed that all amounts were duly paid by the companies. The Director reviewed the facts surrounding the signing of the letter as presented by Alsoroghli and found the view to be reasonably entertained that it was not intended to settle claims for unpaid overtime and compensation for length of service - it was signed because he was desperate for his paycheque. I see no fault in the Director’s analysis of the evidence.

ORDER

- ^{18.} Pursuant to section 115 of the *Act*, I order that the Determination dated March 13, 2009 be confirmed.

Margaret Ostrowski, Q.C.
Member
Employment Standards Tribunal