

An appeal

- by -

Kit International Transport Inc.
("KIT")

- 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: Carol L. Roberts

FILE No.: 2008A/48

DATE OF DECISION: July 7, 2008

DECISION

SUBMISSIONS

K. Preston	on behalf of KIT International Transport Inc.
Sherri Wilson	on behalf of the Director of Employment Standards
Sandeep Rohit Kumar	on his own behalf

OVERVIEW

1. KIT International Transport Inc., ("KIT") appealed a Determination of the Director of Employment Standards ("the Director") issued January 3, 2008. The Director's delegate determined that KIT and Karnail were associated companies pursuant to section 95 of the *Act*, that Mr. Kumar was an employee of the associated companies ("the employer") under the *Act* and that the employer had contravened Sections 18, 45 and 58 of the *Employment Standards Act* in failing to pay Mr. Kumar wages, statutory holiday pay and vacation pay. The delegate concluded that Mr. Kumar was entitled to wages and interest in the total amount of \$6,647.96. The delegate also imposed two \$2,500 penalties on the employer for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulation*.
2. KIT contended that the delegate failed to observe the principles of natural justice in finding that Mr. Kumar was entitled to wages. It did not appeal the other findings.
3. I concluded that the delegate erred in law in failing to properly analyze the evidence and referred the matter back to the Director to determine whether Mr. Kumar was owed wages. (BC EST #D028/08).
4. A new delegate held a "fact-finding meeting" on May 1, 2008 with Mr. Kumar and KIT. KIT was represented by Mr. Kadola (spelled incorrectly as "Kondola" in the Determination) and Ms. Kelly Preston. Mr. Kumar attended with a witness, Ms. Shamni Kumar. The delegate heard evidence from the parties and each were offered an opportunity to ask questions on the evidence.
5. The delegate found Mr. Kadola's evidence that he gave Mr. Kumar a cash payment on January 26th to lack credibility as it was not reasonable in the circumstances and was inconsistent with some of Ms. Preston's evidence. In addition, the delegate determined that Mr. Kadola was evasive and unable to recall important details. She also found that he was unable to provide documentary evidence to support his assertions. The delegate also attempted to contact Mr. Mulgren, an individual who spoke to the delegate during the initial investigation and who was allegedly a witness to the cash payments. Despite leaving several messages for Mr. Mulgren to contact her over a four day period, Mr. Mulgren did not return the delegate's telephone calls.
6. The delegate concluded that Mr. Kumar had not been paid on January 19th and 26th as KIT alleged, and that wages were outstanding.
7. KIT appeals the decision. It asserts that there was no inconsistency in the evidence and that the evidence supports its claim that Mr. Kumar was paid in full.

8. In support of the appeal KIT provided a letter from a Mr. Malmgren in which he states that he observed Ms. Preston paying Mr. Kumar cash payments on three separate dates.
9. Mr. Kumar disputes KIT's assertions and says that the evidence of Mr. Kadola, Ms. Preston and Mr. Malmgren is false.

ANALYSIS

10. The burden is on an appellant to provide persuasive and compelling evidence that a Determination is incorrect. In my view, KIT has failed to discharge this burden.
11. The delegate heard the evidence of the parties and the witnesses. As such, she is in the best position to assess the credibility of the parties. She found the evidence of the employer to be inconsistent, evasive and lacking documentary corroboration. Rather than providing evidence or compelling argument that the delegate's conclusion is incorrect, KIT merely repeats arguments it made before the delegate and says that her conclusions are wrong. That is insufficient to discharge the burden.
12. Furthermore, KIT did not bring Mr. Malmgren, a key witness, to the fact finding session where Mr. Kumar could have asked him questions and the delegate could have heard his evidence first hand. Mr. Malmgren did not return the delegate's subsequent telephone calls and does not explain why he did not do so. His letter is unsworn. I find it of little evidentiary value.
13. I find no error in the delegate's conclusion in the referral back.

ORDER

14. I Order, pursuant to Section 115 of the Act, that the Report to the Tribunal, dated May 15, 2008, and the amounts found payable in the Determination dated January 3, 2008 be confirmed. KIT owes \$6,647.96 in wages to Mr. Kumar and an administrative penalty in the amount of \$5000.00.

Carol L. Roberts
Member
Employment Standards Tribunal