

An appeal

- by -

IVIS Partners Ltd., IVIS Lumber Sales Ltd. and 0734131 B.C. Ltd.
(the “Employer”)

- 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.: 2010A/60

DATE OF DECISION: June 29, 2010

DECISION

SUBMISSIONS

Gurpreet Sangha	on behalf of IVIS Partners Ltd., IVIS Lumber Sales Ltd. and 0734131 B.C. Ltd.
Reena Grewal	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by IVIS Partners Ltd., IVIS Lumber Sales Ltd. and 0734131 B.C. Ltd. (collectively, the “Employer”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a determination of the Director of Employment Standards (“the Director”) issued March 18, 2010 (the “Determination”).
2. Daljit Dhaliwal, Parminder Lail, Sukhpal Randhawa, Harpreet Randhawa, and Ravinder Hair worked as mill workers at the Employer’s lumber mill in Chilliwack, B.C. They filed complaints alleging that the Employer had contravened the *Act* in failing to pay them regular wages, overtime wages, statutory holiday pay, and vacation pay.
3. Following an investigation into the complaints, the Director’s delegate determined that the Employer had contravened sections 18, 40, 126, 45 and 58 of the *Act* in failing to pay the complainants’ wages, overtime wages, statutory holiday pay and annual vacation pay and by issuing NSF cheques. The delegate issued a Determination in the total amount, with interest, of \$25,917.53 representing unpaid wages and interest. Pursuant to section 29(1) of the *Employment Standards Regulation* (“the *Regulation*”), the delegate also imposed a \$3500.00 administrative penalty on the Employer for the contraventions of Sections 17 and 18 of the *Act* as well as Section 46 of the *Regulation*, the latter being in regard to a failure to deliver records.
4. The Employer alleges that the Director failed to observe the principles of natural justice in making the Determination. The Employer further contends that new evidence has become available that was not available at the time the Determination was being made.
5. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* provide that the tribunal may hold any combination of written, electronic and oral hearings (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

6. Did the Director fail to observe the principles of natural justice in making the Determination?
7. Has evidence become available that was not available at the time the Determination was being made?

FACTS AND ARGUMENT

8. The original complaint involves a claim by the five former employees of the Employer seeking compensation for wages, statutory holiday pay and vacation pay for the period August 14, 2009, to September 24, 2009.

The Employer said that no compensation was owed because the mill where the employees worked was closed during that period. The delegate found that the mill was, in fact, operational during that period and that the complainants were owed the monies claimed.

9. The Employer seeks to have the Determination cancelled. The Employer submitted T-4 slips, pay records and information about a key witness whose evidence the delegate relied upon in coming to her conclusion, saying that these were not available to him when the investigation was underway. The Employer contends that the documents show that the complainants were fully compensated and that NSF cheques were improperly issued from the wrong company. He further submits that the assertion by the witness, Mr. Sukh Bhuller, that he was at the mill and saw it operational during the period of time that was the subject of the investigation could not have been possible because Mr. Bhuller was immobilised due to a compound fracture of his right leg and therefore could not drive. The Employer takes issue with the fact that the evidence of this witness was deemed credible by the delegate given that the witness had an ongoing dispute with the Employer.
10. The delegate submits that the Employer has not provided any evidence to support his argument that he was denied natural justice. The delegate further submits that the record of the investigation is clear that the Director did not breach any of the principles of natural justice but rather gave the employer ample opportunity to respond to the allegations against him and provide relevant documents. In his appeal submissions, the Employer contends that the Director failed to observe the principles of natural justice because the delegate has acted in a biased fashion in gathering information and assessing evidence and because no firsthand witness verified the claims made.
11. The delegate submits that the Employer does not address why the payroll records he submits with his appeal could not, with the exercise of due diligence, have been available to him at the time the Determination was being made such that he could have provided them to the Director during the investigation as required, particularly when the “date run” on the payroll summary is months before the final Determination was issued. The delegate also questions the credibility and probative value of the payroll records because no dates for the pay periods are given. Similarly, the delegate points out that the T4 slips were issued by the Employer after the Determination date. The delegate notes that the Employer does not provide an explanation as to why the information he has submitted regarding Mr. Sukh Bhuller could not have been available to him during the investigation or details as to why this information should be believed. The delegate submits that the Employer is simply attempting to reargue this case because he disagrees with the result outlined in the Determination.

ANALYSIS

12. Section 112(1) of the *Act* provides that a person may appeal a decision on the following grounds:
 - the director erred in law,
 - the director failed to observe the principles of natural justice in making the determination; or
 - evidence has become available that was not available at the time the determination was being made.
13. The burden of establishing the grounds for appeal rests with the appellant. In this case the Employer must provide persuasive and compelling evidence that the delegate, on the Director’s behalf, failed to observe the principles of natural justice and that evidence has become available that was not available prior to the Determination. A disagreement with the result, in and of itself, is not a ground of appeal. An appellant must give clear and convincing reasons why the Tribunal should interfere with the Director’s decision on one of

the three grounds for appeal. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate.

14. Having carefully reviewed the record and submissions of the parties, I am not persuaded that the Employer has demonstrated that the Director failed to observe the principles of natural justice or that the Employer has provided credible and probative evidence that was not available at the time the Determination was being made.

Natural Justice

15. Principles of natural justice are, in essence, procedural rights that ensure the parties know the case being made against them, have the opportunity to reply and a right to be heard by an independent decision maker. Parties alleging a denial of a fair hearing must provide some evidence in support of that allegation. (see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99)
16. In this case, the Employer has provided no evidence demonstrating a breach of natural justice. A review of the record shows that throughout the investigation, the parties were given full opportunity to present their respective cases and that the Appellant did not respond in a timely manner to several notifications of the allegations and requests for records.
17. The Employer asserts that the delegate was biased in her view of the evidence before her. Allegations of bias against a decision maker are serious and should not be made speculatively:

An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.))

18. The onus of demonstrating bias lies with the person who is alleging its existence. Furthermore, a “real likelihood” or probability of bias must be demonstrated. Mere suspicions, or impressions, are not enough.
19. The Employer provides no evidence that the delegate was biased. In any event, the Tribunal would only very rarely in the most extraordinary of circumstances set aside a finding by a delegate regarding the credibility and reliability of a particular witness or piece of evidence and this is not warranted by the facts of this case.

New Evidence

20. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- 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;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - 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.

21. A review of the materials indicates that the Appellant has provided no reason why the payroll information, T-4 slips and information regarding the witness, Mr. Sukh Bhuller, could not have been provided to the Director during the investigation leading up to the Determination. The payroll information and other employee records were repeatedly requested by the delegate. The sort of information provided in the Appellant's submission may well have been relevant to issues arising from the complaint but the credibility of this particular evidence is, in my view, highly suspect. The payroll records do not indicate the relevant dates for the pay periods, the T-4 slips were issued after the Determination date but could just as easily have been prepared prior to that date, and no proof of Mr. Bhuller's physical immobility is provided. It follows then that probative value of this information is minimal at best. With regard to the Appellant's assertion that the payroll records for Ravinder Hair show that an NSF cheque was improperly issued and that Mr. Hair and the other complainants were properly compensated, I find that no such inference can be drawn from the documents provided. In fact, it is not clear to me what information, if any, the payroll records accurately reflect that would be relevant to the original complaint or this appeal.
22. I agree with the delegate's submission that the Employer is simply attempting to re-argue the case because he did not agree with the original decision.
23. I deny the appeal.

ORDER

24. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated March 18, 2010, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal