

An appeal

- by -

Condoor Services Inc.

- 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.: 2006A/56

DATE OF DECISION: July 5, 2006

DECISION

SUBMISSIONS

Alain Gadoury	on behalf of Condoor Contracting Inc.
Greg Brown	on behalf of the Director of Employment Standards
Kris Cormier	on his own behalf
Carl Bouchard	on his own behalf

OVERVIEW

1. This is an appeal by Condoor Contracting Inc. (“Condoor”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued March 24, 2006.
2. Carl Bouchard, Kris Corimier and Dominic Melanson (“the employees”) worked as finishing carpenters for Condoor, a door manufacturing and installation business. They each filed complaints alleging they were owed regular wages and overtime wages.
3. The Director’s delegate investigated the complaint as Condoor was no longer in business.
4. Following an investigation that Condoor did not fully participate in, the delegate determined that Condoor had contravened Sections 18, 40, 46 and 58 of the *Employment Standards Act*, and section 46 of the *Employment Standards Regulations* in failing to pay the employees regular and overtime wages, statutory holiday pay and annual vacation pay. The delegate concluded that the employees were, collectively, entitled to wages and interest in the total amount of \$19,420.24. The delegate also imposed a \$2,000 penalty on Condoor for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. Condoor appeal on the grounds that evidence has become available at the time the Determination was being made, and seeks to have the Determination varied.
6. This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUE

7. Has new and relevant evidence become available that would lead the delegate to a different conclusion on a material issue in dispute?

ARGUMENT

8. Mr. Gadoury says that all of the employees' claims have been paid in full but for their 4% vacation pay. The delegate says that the appeal should be dismissed based on Condoor's failure to participate in the investigation process.
9. Mr. Cormier says that the information provided to the Tribunal is incorrect, and that he is entitled to outstanding wages.

THE FACTS AND ANALYSIS

10. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made.
11. This appeal is simply disposed of. The Determination notes that Condoor refused to participate in the investigation. The delegate sent a Demand for Payroll Records to Condoor's records and registered office on January 6, 2006. Canada Post records indicate that they were signed for by Condoor's former bookkeeper.
12. The Demand was also sent to the two Condoor Directors and Officers. No payroll or other employment records were ever provided to the delegate despite the Demands.
13. The delegate had a series of telephone conversations with both Directors regarding the complaints, which produced no information. The delegate also contacted Mr. Gadoury, whom he was advised managed Condoor and who was the employees' supervisor. Although Mr. Gadoury confirmed the employment of the three individuals and promised to provide payroll records, he did not do so.
14. The delegate determined that wages were owed, as set out above.
15. Mr. Gadoury now says that the employees are not owed any further wages. In support of the appeal he submitted appeal documents consisting of a two page document headed "Carl's report", another headed "Carl Bouchard Monies", another entitled "Carl Bouchard Payment" (sic), and a further one page document entitled "Pay check list" purportedly listing cheque dates to a number of individuals including Mr. Cormier and Mr. Melanson.
16. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 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.

17. It is clear that all of this documentation was available to Condoor during the investigation, and I would dismiss the appeal on this basis.

18. I also note that none of the “new evidence” complies with sections 27 and 28 of the *Act*. Section 27 provides as follows:

(1) On every payday, an employer must give each employee a written wages statement for the pay period stating all of the following:

...

(b) the hours worked by the employee;

(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;

(d) the employee's overtime wage rate;

...

19. It is the employer's responsibility to structure its affairs to comply with the *Act*, including maintaining records relating to employment and hours of work (*478125 B.C. Ltd. v. British Columbia (Director of Employment Standards)* BCEST D279/98). Condoor's evidence does not contain information on, for example, the employees' rates of pay, the statutory deductions taken or vacation pay. Even if the information could be considered as new evidence, I am not persuaded that it is reliable in any event, and thus does not meet the third and fourth criteria of the test.

20. The appeal is dismissed.

ORDER

21. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated March 24, 2006, be confirmed in the amount of \$21,420.24, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal