

An appeal

- by -

Grantly Douglas  
(“Douglas”)

- 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:** Shafik Bhalloo

**FILE No.:** 2007A/62

**DATE OF DECISION:** August 27, 2007

## DECISION

### OVERVIEW

1. This is an appeal by Grantly Douglas (“Mr. Douglas”) under Section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) issued May 23, 2007 (the “Determination”).
2. Mr. Douglas filed a complaint against Manfred Knoedler (“Mr. Knoedler”) carrying on business as Beard Construction pursuant to Section 74 of the Act alleging that Beard Construction contravened the Act by failing to pay him wages including overtime pay, reimbursement for some materials he purchased on behalf of Beard Construction and a pay raise he was allegedly promised by Beard Construction (the “Complaint”). The total of Mr. Douglas’ claim in the Complaint was \$7,212.45.
3. The Director’s delegate (the “Delegate”), after conducting a hearing into the Complaint over the course of two days on September 26 and November 24, 2006 (the “Hearing”), determined that Beard Construction contravened Section 18 of the Act in failing to pay Mr. Douglas wages in the amount of \$50.00 plus annual vacation pay in the amount of \$2.00 and accrued interest of \$3.66 on both these amounts for a total of \$55.66. In addition, pursuant to Section 29(1) of the Employment Regulations (the “Regulations”), the Delegate imposed an administrative penalty of \$500.00 on Beard Construction for the said breach of the Act.
4. In the Appeal Form, there are three boxes identifying grounds of appeal and Mr. Douglas has checked off that box which corresponds with the ground of appeal in Section 112(1)(c) of the Act, namely, that evidence has become available that was not available at the time the Determination was being made. While Mr. Douglas has not checked off any other ground of appeal, one could deduce from his written submissions (wherein he makes serious allegations against the Delegate that the latter was biased against him, told him to “shut up” or “was either not listening to testimony, or was following his own agenda due to a personality conflict” with Mr. Douglas and his wife) that Mr. Douglas is also grounding his appeal in Section 112(1)(b) of the Act, namely, that the Director failed to observe the principles of natural justice in making the Determination.
5. In *Triple S Transmission Inc.* (BCEST # D141/03), the Tribunal member expressed the view that the Tribunal should not “mechanically adjudicate an appeal based solely on the particular ‘box’ that an appellant has ... simply checked off”. The Tribunal member went on to add that:

When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, prima facie, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant’s explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

6. I concur with the Tribunal member in *Triple S Transmission Inc.* that “a large and liberal view” should be taken, and therefore propose to address Mr. Douglas’ submissions in context of the ground of appeal in Section 112(1)(b) as well. Having said this, I would like to point out that the Tribunal should always be cautious in addressing grounds of appeal not clearly identified in an appellant’s appeal form or submissions, particularly when the respondent has not been afforded an opportunity to respond or make

arguments relating to the unidentified grounds of appeal. However, in the case at hand that is not a concern I have to deal with as both the Director and counsel for Beard Construction have provided full and complete submissions in response to Mr. Douglas' allegations relating to the natural justice ground of appeal.

7. Further, in his Appeal Form, Mr. Douglas has requested, by way of a remedy, that the Determination be cancelled or referred back to the Director.
8. Mr. Douglas has also requested an oral hearing of the Appeal but made no relevant submissions in support of his request. While I acknowledge from his submissions that Mr. Douglas can now afford a lawyer and has the ability to subpoena witnesses (if he succeeds in having this Tribunal refer the matter back to the Director), his financial ability to retain a lawyer is not relevant in determining whether an oral hearing of his appeal is necessary. Section 36 of the *Administrative Tribunals Act* (which is incorporated in Section 103 of the Act) and Rule 16 of the Tribunal Rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. I am of the view that Mr. Douglas' Appeal can be adjudicated on the written submissions of the parties without resort to an oral hearing. Accordingly, I have decided that this Appeal will be decided based on the written submissions of the parties, the Section 112(5) "Record" and the Reasons for the Determination.

## **ISSUES**

9. The issues to be determined in this appeal are two-fold, namely:
  1. Is there new and relevant evidence that was not available at the time the Determination was being made that would have led the Delegate to a different conclusion on a material issue and would warrant this Tribunal to cancel the Determination or refer the matter back to the Director?
  2. Did the Director of Employment Standards fail to observe the principles of natural justice in making the Determination?

## **FACTS**

10. While I have carefully reviewed and considered the evidence adduced by both Mr. Douglas and Beard Construction at the Hearing of the Complaint and the findings of fact made by the Director and the Determination, it is not necessary for me to delineate or summarize the same here to deal with the issues raised in this Appeal. The issues raised by Mr. Douglas in his Appeal are in the nature of general allegations and conclusions that I propose to deal with in the next section entitled "Argument and Analysis".

## ARGUMENT AND ANALYSIS

### I. NEW EVIDENCE

#### *Submissions of Mr. Douglas*

11. The gist of Mr. Douglas's argument under the "New Evidence" ground of appeal is that when he filed the Complaint, he "was flat broke" and "could not afford a lawyer ... (or) to subpoena witnesses". Mr. Douglas indicates that he can now afford a lawyer and to subpoena witnesses "that can and will prove once and for all who is really telling the truth". Beyond these assertions, Mr. Douglas does not set out in his submissions the names of the witnesses he wants to subpoena and what evidence they would or are prepared to provide which was not available at the time the Determination was being made.

#### *Submissions of the Director*

12. The Director, in response, argues that Mr. Douglas has not provided any new evidence. The Director claims that the new evidence Mr. Douglas speaks of is "hypothetical evidence that he contends will come out of a new Hearing", and this is not a sound basis for an appeal, as it does not meet any criteria for admitting new evidence in appeals before the Tribunal.

#### *Submissions of Beard Construction*

13. Counsel for Beard Construction, in the latter's response, refers to the four-fold test in *Re Merilus Technologies Inc. BC EST # D171/03* that has guided the Tribunal time and again in appeals where the appellant wants to adduce "new evidence" and argues that Mr. Douglas' appeal on the ground of "new evidence" should be rejected. More specifically, with respect to the first condition of the *Merilus* test, counsel for Beard Construction states that Mr. Douglas has failed to provide any reason, other than he did not have the requisite funds to subpoena any witnesses, as to why the unknown new evidence could not have been discovered with the exercise of due diligence and presented to the Director during the adjudication of the Complaint and prior to the Determination being made. Counsel argues that if Mr. Douglas knew the evidence of the unnamed witnesses was important to his case and if he was aware that they would not attend willingly then "it was incumbent upon Mr. Douglas to bring this to the attention of the Director before the day of the Complaint Hearing, or to the Adjudicator on the day of the Complaint Hearing". Counsel further argues that the Director could have compelled the witness to attend and Mr. Douglas would only have been required to pay a nominal witness fee of \$20.00 and reasonable travel expenses, if a subpoena had to be issued.
14. With respect to the second condition of the *Merilus* test, counsel for Beard Construction indicates that Mr. Douglas has given no indication of who the witnesses are, what evidence they may give and how relevant their evidence may be to the issues in the Determination.
15. With respect to the third condition of the *Merilus* test, counsel for Beard Construction states that in light of Mr. Douglas' explanation that the new unnamed witnesses are more willing to testify now than at the time of the Determination because Beard Construction has terminated their services for being friendly with him, the testimony of these new unnamed witnesses would be called into question in regards to credibility and veracity.

16. With respect to the final criteria of the *Merilus* test, counsel for Beard Construction states that any potential testimony of any new witnesses would not change the Determination because in the Determination, the Delegate found Mr. Douglas's evidence was unreliable and that his testimony at times conflicted with his own documentary evidence. Moreover, argues counsel, Mr. Knoedler's evidence was preferred by the Delegate over Mr. Douglas' when there was a conflict between their evidence. Counsel also states that it was not the lack of supporting testimony that resulted in the dismissal of the majority of Mr. Douglas' Complaint, but rather the lack of supporting physical documentation and the conflict between Mr. Douglas' own testimony and the records. Accordingly, counsel for Beard Construction argues that Mr. Douglas fails on each count of the *Merilus* test for accepting fresh or new evidence.

### *Analysis*

17. As pointed out in the submissions of counsel for Beard Construction, the governing test for allowing new evidence on appeals is delineated in *Re Merilus, supra*. The appellant adducing new evidence must satisfy four conditions before the new evidence will be considered, namely:
- 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.
18. The criteria above, as indicated by this Tribunal in *D-Tech Muffler and Auto Centre Ltd. BC EST # 120/06*, are conjunctive.
19. In this case, by virtue of Mr. Douglas' failure to disclose the nature, specifically or generally, of his "new evidence" (not to mention the names of the new witnesses he proposes to call), this Tribunal is not in a position to assess whether Mr. Douglas' "new evidence" would satisfy the *Merilus* test. Moreover, it is not for this tribunal to divine what "new evidence" Mr. Douglas is referring to; it is for Mr. Douglas to delineate the "new evidence" he wishes to call. In the circumstances, Mr. Douglas' appeal based on new evidence is rejected.

## **II. NATURAL JUSTICE**

### *Submissions of Mr. Douglas*

20. Mr. Douglas argues that the Delegate was biased against him and that he was prejudiced by virtue of not being able to afford a lawyer. In particular, he states:

"I believe that the adjudicator was prejudiced against me because of the lies that Mr. Knoedler told about me. I believe that he became prejudiced from the very beginning and that as a result my

case and decision were not handled in a timely manner. I believe that the adjudicator strung it out for so long in an attempt to get me to drop my complaint. It felt like a kangaroo court. Everything I said was either ignored or disbelieved, or because I did not have a lawyer I was not able to overrule being told to shut up. Everything Mr. Knoedler's lawyer and himself said was taken as verbatim."

21. Mr. Douglas goes on further to allege that:

"The Decision was entirely one-sided and confirms that the adjudicator was either not listening to testimony, or is following his own agenda due to a personality conflict between him and myself and my wife. He made it very plain that he did not think much of us, and his one-sided decision confirms all of my previous suspicions of this."

22. And, finally, Mr. Douglas states:

"I can now afford a lawyer, and I can now afford to subpoena witnesses that can and will prove once and for all who is really telling the truth."

### ***Submissions of the Director***

23. With respect to Mr. Douglas' allegation of bias on the part of the Delegate, the Director states that the Hearing of the Complaint took place over two days, on September 26, 2006 and on November 24, 2006. On the first day, Mr. Douglas attended with his wife, Ms. Sylvia Hughes ("Ms. Hughes"). During his cross-examination by counsel for Beard Construction, Mr. Douglas became confused about certain evidence and his wife, Ms. Hughes, tried helping by answering some of the questions. Consequently, counsel for Beard Construction objected to Ms. Hughes' interference. The Director states that the Delegate cautioned Ms. Hughes a number of times not to answer questions posed to Mr. Douglas on cross-examination. However, when Ms. Hughes continued despite the Delegate's caution, the Delegate separated her from Mr. Douglas at the hearing room table so as to prevent her from instructing Mr. Douglas further during cross-examination.

24. The Director further submits that the Delegate never told Mr. Douglas or Ms. Hughes to "shut up" at any time during the Hearing. To the contrary, the Director submits that when Mr. Douglas was under cross-examination by Mr. MacDonald at the Hearing, he became quite irritated with Ms. Hughes and told her to shut up.

25. With respect to Mr. Douglas' allegation that the Delegate did not handle the Complaint or the Hearing in a timely fashion, and "strung it out for so long in an attempt to get (him) to drop (his) Complaint", the Director states that the second day of the Hearing, on November 24, was the earliest date that all parties were able to reconvene and that the date was set up by the Delegate's support staff, and the Delegate vigorously denies that he "dragged the process out in an attempt to get (Mr. Douglas) to drop his case".

26. The Director further submits that while Mr. Douglas may not be happy with the Determination, there are no grounds to suggest that the Delegate was prejudiced against him. The Director further notes that Mr. Douglas was provided "all the time he needed to present his evidence and at no time was he pressured to hurry". The Director argues that while Mr. Douglas may not be happy with the outcome of the Hearing of his Complaint, there really are no grounds to suggest that the Delegate was prejudiced against him in any way.

### ***Submissions of Counsel for Beard Construction***

27. Counsel for Beard Construction asserts that Mr. Douglas has not made out a claim of prejudice or adjudicator bias. Counsel specifically submits that while the evidence of the parties may differ in cases, a decision-maker must make a reasoned decision about which evidence is to be preferred. In the case at hand, counsel states that the Delegate preferred the evidence of the witnesses produced by Beard Construction to Mr. Douglas' evidence and the Delegate's reasoning is well considered and "entirely reasonable".

### ***Analysis***

28. The Tribunal in *Re 607730 B.C. Ltd. (c.o.b. English Inn and Resort) [2005] B.C.E.S.T.D. No. 55 (QL)* noted that the principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision-maker. Any party alleging a denial of a fair hearing has the onus to provide some evidence in support of that allegation (*Re Healey [2004] B.C.E.S.T.D. No. 207 (QL)*). In the case at hand, the allegation of bias or prejudice on the part of the Delegate made by Mr. Douglas is a very serious allegation, and the onus of demonstrating it lies with Mr. Douglas.

29. In *R v. S (R.D.) (1997)*, 118 C.C.C. (3<sup>rd</sup>) 353, the Supreme Court of Canada reiterated that the test to be applied when it is alleged that a judge is not impartial is "whether the particular conduct gives rise to a reasonable apprehension of bias." At pages 389 and 390, Cory J. stated:

"... the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information .... The test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude'."

30. Applying this test, it is my view that the hypothetical person described in the test, on reviewing the evidence before this Tribunal comprising of the Section 112(5) record, the submissions of the parties would conclude that "realistically and practically" Mr. Douglas has not demonstrated bias or prejudice on the part of the Delegate, and that the conduct of the Delegate including his findings of facts and reasoning leading to the Determination are fair. Furthermore, the said hypothetical person would also conclude that Mr. Douglas' allegations of bias and prejudice on the part of the Delegate are no more than mere suspicions or impressions and that there is no real evidence provided in his appeal submissions supporting those suspicions or impressions. Accordingly, the allegation of bias or prejudice on the part of the Delegate is not proven, and this ground of appeal is also dismissed.

31. Finally, with respect to Mr. Douglas' submission that he would have fared better if he had a lawyer and that he should have a re-hearing now that he can afford a lawyer, in my view the principles of natural justice do not require that each party appearing before an administrative tribunal must have or should be provided legal representation. As indicated previously, principles of natural justice are procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision-maker. In the case at hand, there is no evidence that Mr. Douglas was denied the said procedural rights.

**ORDER**

32. Pursuant to Section 115 of the Act, I order that the Determination be confirmed as issued.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**