

An appeal

- by -

Blackwater Construction Co. Ltd.
(“Blackwater”)

- 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: Robert E. Groves

FILE No.: 2010A/050

DATE OF DECISION: July 12, 2010

DECISION

SUBMISSIONS

Terrance O'Neill	on behalf of Blackwater Construction Co. Ltd.
Barbara Laass	on her own behalf
Daryl Jordan	on his own behalf
Albert Parsons	on his own behalf
Wallace Sharpe	on his own behalf
Warren Appler	on his own behalf
John Nelson	on his own behalf
Ronald Buchi	on his own behalf
Bonnie Anderson	on her own behalf
Alan Phillips	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal brought by Blackwater Construction Co. Ltd. ("Blackwater") through its principal Terry O'Neill ("O'Neill"). Blackwater challenges a March 5, 2010 determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards which decided that Blackwater had contravened sections 63 and 58 of the *Employment Standards Act* (the "*Act*"), and therefore owed several of its former employees compensation for length of service, annual vacation pay and interest in discrete amounts totaling \$103,583.79. The Delegate also imposed an administrative penalty payable by Blackwater in the amount of \$500.00
2. I have before me submissions from Blackwater, a submission from the Delegate, the record the Delegate has delivered in compliance with section 112(5) of the *Act*, and submissions from several of the employees who filed complaints following the loss of their employment with the company.
3. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. My review of the material before me persuades me that I may decide this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

4. Blackwater is a federally incorporated company, but it is extra-provincially registered in British Columbia and carries on operations here. The Delegate determined that the company conducted business primarily as a logging contractor, notwithstanding that it had made efforts to diversify its operations into the construction, mining and oil and gas sectors of the economy over time.
5. Like many other employers in the forest harvesting sector, Blackwater regularly laid off employees during spring "break-up." The spring of 2009 was no exception. However, due to the world recession, and

difficulties it encountered in maintaining its credit facilities with its bank, Blackwater did not recall the employees at the end of their temporary lay-off periods, and so they were deemed to have been terminated pursuant to section 63(5) of the *Act*. Blackwater provided no notice of termination, or compensation for length of service, to the employees it had laid off.

6. A number of the terminated employees filed complaints with the Director. Blackwater appears to have co-operated with the Delegate's ensuing investigation. In his Determination, the Delegate analyzed each employee's entitlement to compensation for length of service having regard to the division within Blackwater's operation in which the particular employee had been working prior to termination. Some of the employees had been working in Blackwater's logging operation. Others worked in its construction division. The remainder worked in its office.
7. The Delegate determined that Blackwater had advanced no argument capable of supporting a conclusion that the employees working in its logging and office operations should be denied compensation for length of service.
8. As for Blackwater's employees performing work in its construction division, the Delegate considered whether no compensation for length of service was payable to them due to the operation of section 65(1)(e) of the *Act*, which reads:

65(1) Sections 63 and 64 do not apply to an employee...

(e) employed at one or more construction sites by an employer whose principal business is construction...

9. The Delegate declined to give effect to this exemption. He observed that Blackwater's various operations were conducted under the umbrella of a single legal entity. Its construction business was not carried on in a manner independent from the company's other activities. Viewing Blackwater's operations as a whole, the Delegate determined that the company did not conduct its principal business in construction. Instead, it was primarily a logging contractor, and so section 65(1)(e) had no application.
10. Blackwater, in submissions delivered by its principal, O'Neill, appeals the Determination, raising several distinct matters for my consideration:
 - Blackwater did not intend to terminate the complainants' employment, as the decision not to recall them from their seasonal lay-offs resulted from steps taken by Blackwater's bank to call its loans, making it impossible for it to continue normal operations;
 - the sums for compensation for length of service calculated for Blackwater's construction workers are "invalid" because they were hired "on a per project basis;"
 - the determination that Blackwater conducts its principal business as a logging contractor is incorrect;
 - the Delegate interpreted Blackwater's payroll information incorrectly, and so the calculations for compensation for length of service for some employees are inaccurate;
 - requiring Blackwater to pay the sums set out in the Determination will place the company into bankruptcy.
11. O'Neill has raised another issue in his submissions. He states that the disclosure in the Determination that O'Neill is personally responsible as the sole director of Blackwater to pay the sums found to be owed violates his privacy. I decline to consider this submission for two reasons. First, it appears to me to be an issue that

does not relate directly to Blackwater, but rather to O'Neill personally. This is Blackwater's appeal, not O'Neill's. Second, the potential liability of the directors and officers of Blackwater is contemplated by sections 96 and 98 of the *Act*. Proceedings under the *Act* are also a matter of public record, as section 101 makes abundantly clear. I fail to see, and O'Neill does not explain, why the statement in the Determination that the directors and officers of Blackwater may be required to pay wages owed by the company to employees could be construed to be a violation of his right to privacy.

ISSUE

12. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

13. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

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 being made.

14. Section 115(1) of the *Act* should also be noted. It says this:

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

15. Blackwater wishes the Determination to be cancelled. It asserts that section 112(1)(b) provides a basis for such a disposition. Blackwater alleges that the Delegate failed to observe the principles of natural justice in making the Determination.

16. In my view, Blackwater has misconstrued the focus of section 112(1)(b) when it prepared its submissions on this appeal. A challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by the Delegate was in some respect unfair. Examples of cases where natural justice concerns may arise include situations where a party like Blackwater has not received notice of a complaint, or has been deprived of a reasonable opportunity to respond to it. In other situations, a decision may be impeached if a party can show bias on the part of the decision-maker, whether actual, or reasonably apprehended.

17. There is nothing to which Blackwater has referred in its submissions which leads me to conclude that the Delegate failed to observe these principles. It is clear from the record that the Delegate prepared a preliminary assessment of the complaints which he shared with Blackwater, and to which he invited a response before issuing the Determination. There appear to be no matters of importance forming the substratum of the Determination of which Blackwater was unaware or in respect of which it was deprived of the opportunity to deliver a response.

18. Blackwater's position regarding natural justice does not, in fact, confront the manner in which the Delegate conducted the proceedings prior to his issuing the Determination. Instead, Blackwater submits that there would be no natural justice in the circumstances of this case if the Determination were permitted to stand, for the following reasons:
- Blackwater will cease to do business, and the employees it has retained will also lose their jobs;
 - Blackwater's intentions regarding its keeping its employees at work were good, but the recession, and the untimely intervention of its bank, were circumstances which arose that were clearly beyond its ability to manage while maintaining its workforce;
 - O'Neill did his best to provide the names of his terminated employees, and references for them, to other employers who might be in a position to hire them;
 - the terminated employees have a safety net of employment insurance and other benefits available to them, which O'Neill does not;
 - post-termination, O'Neill has pursued other opportunities for Blackwater, to rebuild the business, in the hope that it can re-employ the persons it has lost.
19. I have no doubt these concerns are genuinely expressed, but they do not raise an issue of natural justice in the sense those words are meant to be interpreted for the purposes of section 112(1)(b). None of the items referred to by O'Neill undermine the validity of the procedure the Delegate followed during his investigation, or when he formulated the content of the Determination. There is, moreover, no suggestion of bias.
20. A failure to observe the principles of natural justice is the only ground of appeal Blackwater identified on its Appeal Form. However, in order to do justice to appellants, particularly where, as here, they are unrepresented, it is the practice of the Tribunal to seek to discern from the record the true basis for a challenge to a determination, regardless of the particular box that may have been checked off on the Form (see *Triple S Transmission Inc.* BC EST #D141/03). Here, I believe I must consider the other submissions made by Blackwater in order to determine if they disclose grounds of appeal that might fall within sections 112(1)(a) or (c) of the *Act*.
21. In my view, the fact that O'Neill, on behalf of Blackwater, may have wished to retain the complainants as employees, but felt he was prevented from doing so due to factors beyond his control, is not relevant for the purposes of determining whether Blackwater conducted its affairs in violation of the *Act*. The same can be said for the suggestion that the enforcement of the Determination may result in bankruptcy for Blackwater, and for O'Neill personally.
22. The *Act* is benefits-conferring legislation. It is designed to protect the interests of employees by requiring employers to comply with certain minimum standards that are mandated by the statute. As the *Act* is remedial legislation, it should be given such fair, large, and liberal construction by the Tribunal as best ensures the attainment of its objects (see *Machtiger v. HOJ Industries Ltd.* [1992] 1 SCR 986; *Re Helping Hands Agency Ltd.* (1995) 131 DLR 4th 336). At the same time, it must be remembered that the Tribunal is a creature of statute; it has no jurisdiction to decide appeals based on purely equitable considerations (see *Director of Employment Standards* BC EST #RD635/01; *Re Bennett* BC EST #RD234/01). This means that while O'Neill may believe that he committed Blackwater to a course of conduct which resulted in its contravening the *Act* for reasons that were pure, he cannot escape a determination that the contraventions occurred, for which the *Act* stipulates a remedy.
23. Blackwater also asserts that the sums calculated as being owed for compensation for length of service in respect of its construction workers are "invalid" because they were hired "on a per project basis," and that the

Delegate interpreted Blackwater's payroll information incorrectly, with the result that the calculations for compensation for length of service for some employees are inaccurate. The difficulty I have with these submissions is that the schedule supplied by Blackwater in support of these assertions is cryptic, and there is no discussion in its material which clarifies why, and if so where, precisely, the Determination can be said to have been prepared in error on these grounds.

24. It must be understood that when the Tribunal exercises its jurisdiction under section 112 it is engaged in the process of correcting error. A determination is deemed to be correct until an appellant proves that it is not, in whole or in part. As the onus is on an appellant to demonstrate that there has been an error, it must ensure the sufficiency of its arguments in an appeal. If, as here, an appellant merely states that there is an error, but fails to provide detail sufficient to explain where it may be found, and how it may be corrected, it will not satisfy that burden (see *MSI Delivery Services Ltd.* BCEST D051/06).
25. The final ground of appeal is Blackwater's assertion that the company's principal business was construction, not logging, and so the terminated employees working in the construction division should not receive compensation for length of service due to the effect of section 65(1)(d), alluded to above. The Delegate's submission on appeal states that Blackwater did not raise this issue during the course of the investigation, but it appears that the Delegate did refer to it, nevertheless, in the Determination. Blackwater now submits a schedule of its employees, and a form of financial statement showing the various sources of revenue for the company, all in support of the contention that its principal business was construction.
26. It would seem that neither the schedule nor the financial statement were produced during the course of the investigation, and I am reluctant to consider them because I do not believe they satisfy the test for "new evidence" referred to in section 112(1)(c) of the *Act*. The information contained in these documents must have been available to Blackwater prior to the Determination being made. Certainly, Blackwater offers no explanation why this material might have been unavailable to it at that time. As many decisions of the Tribunal have noted, the appeal jurisdiction set out in section 112(1)(c) is not meant to act as an invitation to a party unhappy with a determination to gather and present on appeal evidence that with reasonable diligence could have been produced as part of the investigatory process.
27. But even if the evidence can be said to be "new" in the sense contemplated by section 112(1)(c), I am not persuaded that it demonstrates to the requisite standard that the Delegate erred in finding that the principal business of Blackwater was logging. This finding, in my opinion, was a finding of fact. Section 112(1)(a) does not permit the Tribunal to interfere with a delegate's findings of fact. It only permits the Tribunal's intervention if the delegate can be said to have committed an error of law. Errors of fact do not amount to errors of law except in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. An example would be a situation where a finding of fact is irrational or inexplicable because it is based on no evidence at all.
28. Here, there was some evidence on which the Delegate could reasonably have come to the conclusion that the principal business of Blackwater was logging, not construction. I note that in the record the Delegate considered during his investigation there appears a memorandum apparently issued by O'Neill on behalf of Blackwater in or about the time of the lay-offs in 2009, addressed on its face to the employees of the company, which states that forestry has always been the "backbone" of its operations. In his submissions, the Delegate alludes to the fact that while the revenue for the company since its financial troubles began has been derived more markedly from sources apart from logging, Blackwater's primary business was logging at the time the employees were laid off, and it was Blackwater's liquidation of its forest-harvesting assets due to its need to re-organize its affairs with its bank that led to the decline in this aspect of its business. The financial statement produced by Blackwater, which appears to be for the period ending in October 2008, is

inconclusive because it lacks supporting detail that explains the nature of the sources from which it derives its income, but even on its face the sources marked "construction" still seem to constitute little more than ten percent of the total revenues for the company. As for the schedule, it appears to show that but three of the thirty-nine employees listed were designated as construction workers. None of this supports in a convincing way Blackwater's argument that its primary business was construction.

ORDER

29. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated March 5, 2010 be confirmed as issued in the amount of \$104,083.79 together with whatever additional interest that has accrued pursuant to section 88 of the *Act* since the date of issuance..

Robert E. Groves
Member
Employment Standards Tribunal