

An appeal

- by -

Can-Pacific Trading Inc.
("Can-Pacific")

- 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.: 2011A/72

DATE OF DECISION: August 10, 2011

DECISION

SUBMISSIONS

Robert Walsh	on behalf of Can-Pacific Trading Inc.
Inderjit Singh Dhillon	on his own behalf
Kulwinder K. Boparai	on her own behalf
Ken White	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal, pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), by Can-Pacific Trading Company Inc. (“Can-Pacific”) of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 4, 2011 (the “Determination”). The appeal is filed by Robert Walsh (“Mr. Walsh”), president and Director of Can-Pacific.
2. The Determination found Can-Pacific contravened sections 18 (wages), 40 (overtime), 58 (annual vacation pay) and 63 (compensation for length of service) of the *Act*. The Determination also levied an administrative penalty of \$500.00 against Can-Pacific, pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”), for contravention of section 18 of the *Act*. The total amount payable under the Determination, inclusive of accrued interest pursuant to section 88 of the *Act*, is \$2,387.81.
3. Can-Pacific’s appeal is based on the “new evidence” ground of appeal in section 112(1)(c) of the *Act*. It contends that evidence has become available that was not available at the time the Determination was being made and seeks to have the Determination changed or varied or referred back to the Director.
4. Neither party has sought an oral hearing of the appeal and, in my view, a decision can be made without an oral hearing based on the Reasons for the Determination, the submissions of the parties, and the section 112(5) record submitted in this appeal.

ISSUE

5. The sole issue in Can-Pacific’s appeal is whether there is new evidence available that was not available at the time the Determination was made and, if so, is this new evidence sufficient to justify the Tribunal to change or vary the Determination under appeal or to refer the matter back to the Director.

FACTS

6. Can-Pacific operates a production centre for sorting and grading used clothing, and employed Kulwinder Boparai (“Ms. Boparai”) and Inderjit Dhillon (“Mr. Dhillon”) (collectively the “Complainants”) as production workers from October 11, 2010, to November 4, 2010, and April 26, 2010, to November 5, 2010, respectively.

7. Pursuant to section 74 of the *Act*, the Complainants filed their complaints against Can-Pacific, within the time permitted under the *Act*, alleging that Can-Pacific contravened the *Act* by failing to pay them regular wages, overtime wages, vacation pay and compensation for length of service (the “Complaints”).
8. The Delegate, during the investigation of the Complaints, contacted Can-Pacific’s President, Mr. Walsh, and received an email confirmation from the latter that the Complainants were owed the amounts they claimed for regular wages and vacation pay. Mr. Walsh’s email to the Delegate stated:

I acknowledge that only the above mentioned funds are owed to Mr. Dhillon and Ms. Boparai. Currently Can Pacific or myself has no ability to pay at this time, however, I am still working on refinancing and starting the company again. I understand that I have a legal responsibility to pay these owed earnings and it is my intention to do so.

9. However, Mr. Walsh did not acknowledge any amounts owed the Complainants for overtime and compensation for length of service. As a result, the Delegate sent a further email to Mr. Walsh on March 21, 2011, demanding payroll records pertaining to the Complainants. Mr. Walsh responded by contacting the Delegate and agreeing that the Complaints were owed overtime and compensation for length of service as claimed, and agreed to pay all the amounts owing to the Complainants by April 11, 2011, through the office of the Ministry of Labour and Citizens’ Services and Open Government (the “Ministry”). Subsequently, the Director confirmed Mr. Walsh’s representations in an email.
10. However, on April 11, 2011, Can-Pacific or Mr. Walsh made no payment to the Ministry. As a result, the Delegate, on April 12, 2011, telephoned Mr. Walsh and left a message that if payment was not forthcoming to the Ministry by 4:30 p.m. on the same date, a determination would be issued. Subsequently, on April 21, 2011, the Delegate issued the Determination.

SUBMISSIONS OF CAN-PACIFIC

11. Mr. Walsh, on behalf of Can-Pacific, submits that it has come to his attention that the Complainants “have continued to work for the company which took over operations from Can Pacific Trading in Nov/Dec 2010”. The company in question is named Pacific Clothing Recyclers (“Pacific Clothing”).
12. Mr. Walsh further submits that Can-Pacific did not issue either of the Complainants with a termination notice and requests the Tribunal to determine if the Complainants indeed continued to work for Pacific Clothing and if this affects the Determination against Can-Pacific to pay the Complainants compensation for length of service.
13. Mr. Walsh also seeks a cancellation or reduction of the administrative penalty of \$500.00 under the *Regulation*. He states that once he learned that both Complainants were continuing to work at Pacific Clothing, he attempted to contact Mr. White by telephone “many times to discuss this issue” but his “repeated messages...were not returned”. He also submits that the administrative penalty will cause Can-Pacific and himself, as a Director of Can-Pacific, hardship as Can-Pacific is “under a requirement to pay from CRA”.
14. He concludes his submissions by stating that he, as a Director of Can-Pacific, accepts responsibility to pay wages owed to his former employees “once the correct amount has been determined”, but the administrative penalty “is creating undo [sic] financial hardship” to him, particularly as his former business partner has returned to South Korea and is not accepting responsibility in the matter.

SUBMISSIONS OF THE DIRECTOR

15. The Director submits that Can-Pacific has offered no explanation of when the purported new evidence became available. He submits that with sufficient due diligence, Can-Pacific could have brought the purported new evidence to the attention of the Delegate before the Determination was issued.
16. The Director also submits that there is no evidence of any calls or messages Mr. Walsh claims he left for the Delegate. In any event, the Director submits that during the Delegate's investigation of the Complaints, Mr. Walsh communicated by email and suggests that he could have done the same to convey the purported new evidence.
17. The Director concludes that Can-Pacific's appeal is without merit and should be dismissed.

ANALYSIS

18. Can-Pacific's appeal, as indicated, is based on the "new evidence" ground of appeal in section 112(1)(c).
19. The Tribunal, in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03, set out four (4) conjunctive requirements which must be met before new evidence will be considered on appeal. These requirements are as follows:
 - 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.
20. The Tribunal will not consider evidence, in the context of an appeal, which could have been provided at the investigation stage or before the Determination is made (see *607470 B.C. Ltd. carrying on business as Michael Allen Painting*, BC EST # D096/07; *Kaiser Stables Ltd.*, BC EST # D058/97).
21. In this case, I am not persuaded that the purported new evidence Mr. Walsh, on behalf of Can-Pacific, wishes to adduce in the appeal, was not available at the time of the investigation of the Complaints or before the Determination was made. I note that Mr. Walsh, in his appeal submissions, states that Pacific Clothing "took over operations" from Can-Pacific in November or December, 2010, well in advance of the filing of the Complaints by the Complainants in mid-January and February, 2011. Mr. Walsh does not indicate how the new evidence came to his attention. He also does not appear certain of the new evidence as he indicates that the Complainants "*may* have continued to work for [Pacific Clothing]". Therefore, the veracity of this "new" information is in question and he wants the Tribunal to "determine" if "[the Complainants] continued working for Pacific Clothing". Notwithstanding the uncertainty of the purported new evidence, I am not convinced that the purported new evidence was not available during the investigation of the Complaint and before the Determination was made, particularly in light of Mr. Walsh's representation that Pacific Clothing "took over operations" from Can-Pacific in November or December 2010.

22. I am also not convinced that Mr. Walsh made any telephone calls to the Delegate to convey the purported new evidence. If he did make such calls, there is no indication of when those calls were made. In the circumstances, I reject Can-Pacific's appeal on the new evidence ground of appeal.
23. I also find that the administrative penalty for \$500.00 under the *Regulation* was appropriately levied in this case. In any event, the Tribunal does not have the discretion to "reduce" the mandatory penalty. The Tribunal only has the authority to cancel it if the penalty was levied inappropriately, which is not the case here.

ORDER

24. I order, pursuant to section 115 of the *Act*, that the Determination, dated May 4, 2011, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal