

An appeal

- by -

King Cobra Transport Inc.
("King Cobra")

- 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: David B. Stevenson

FILE No.: 2010A/79

DATE OF DECISION: August 3, 2010

DECISION

SUBMISSIONS

Harjinder Singh Dhaliwal	on behalf of King Cobra Transport Inc.
Baldev Singh Rai	on his own behalf
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by King Cobra Transport Inc. (“King Cobra”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 27, 2010.
2. The Determination was made by the Director on complaints filed by Kulwinder Singh Bullar (“Mr. Bullar”) and Baldev Singh Rai (“Mr. Rai”), who alleged King Cobra had contravened the *Act* by failing to pay regular wages and overtime. The Determination found that King Cobra had contravened Part 3, section 18 and Part 7, section 58 of the *Act* and ordered King Cobra to pay Mr. Bullar and Mr. Rai \$5,448.05, an amount which included wages and interest.
3. The Director also imposed administrative penalties on King Cobra under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00.
4. The total amount of the Determination is \$6,448.05.
5. King Cobra has appealed only that part of the Determination dealing with the amount awarded to Mr. Rai on the ground that evidence has come available showing Mr. Rai had been paid \$939.00 of the amount he was awarded in the Determination. King Cobra seeks a variance of the Determination, reducing Mr. Rai’s wage entitlement by that amount.
6. The Tribunal has a discretion whether to hold an oral hearing on an appeal: see Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. No oral hearing is sought on this appeal and the Tribunal has decided an oral hearing is not necessary. This appeal will be decided on the submissions and the material submitted by the parties, including the section 112 (5) Record filed by the Director.

ISSUE

7. The sole issue in this appeal is whether King Cobra has shown there is evidence that has come available which was not available at the time the Determination was being made and should be accepted by the Tribunal.

THE FACTS

8. King Cobra operates a trucking company. Mr. Bullar and Mr. Rai were employed by King Cobra as truck drivers from September 25, 2008 and September 30, 2008, respectively, to November 14, 2008. They complained that King Cobra had failed to pay regular wages and overtime. I do not have the complaint form for Mr. Bullar in the section 112(5) Record, but Mr. Rai's complaint form indicates he was claiming wages and overtime for a period from October 16 to November 14, 2008.
9. After the complaints were filed, there were efforts made by the Director to arrange meetings involving the complainants and a representative of King Cobra. An initial meeting was adjourned when Mr. Harjinder Singh Dhaliwal, a director of King Cobra at the time of the complainant's employment, informed the Director he had sold the company. Notice was provided to the persons identified by Mr. Dhaliwal as the new owners of the company. Another meeting was arranged and notices sent out. The Director contacted Mr. Dhaliwal a week before the scheduled meeting and he indicated he would attend. On the scheduled day, the complainants attended; the new owners of the company attended; Mr. Dhaliwal did not. The Director unsuccessfully attempted to call Mr. Dhaliwal.
10. The complainants provided evidence of their claims. King Cobra provided the Director with time sheets completed by the complainants.
11. Mr. Dhaliwal did provide some information to the Director. There was, some time after the meeting, a discussion with Mr. Dhaliwal and an agreement by him to pay the complainants the amounts the Director had calculated were owed. He was asked by the Director to provide evidence that each of the complainants had been paid all of their wages for the entire period of their employment and that he had complied with his agreement to pay the agreed amount. He failed to do so. The Director issued the Determination.
12. The Director found there were regular wages owing, and awarded those amounts in the Determination, but found no evidence of the complainants having worked any overtime hours.

ARGUMENT

13. The appeal does not really provide any argument. Mr. Dhaliwal has submitted a copy of a cheque for \$939.00 made payable to Mr. Rai, dated November 07, 2008, and says this is evidence that Mr. Rai was paid wages in that amount in the claim period and that amount should be deducted from the wages found owing to him in the Determination.
14. The Director and Mr. Rai have filed replies to the appeal.
15. The Director says this information is not new evidence; it was available during the investigation of the complaints and could have been provided. The Director says, in any event Mr. Rai claimed he had received \$300.00 in the claim period and this amount was deducted from the wages awarded. If the Tribunal decided to vary the Determination, the adjustment would need to reflect the reduction already made.
16. Mr. Rai says this cheque was for work he performed in the period from September 30 to October 15, 2008 which was before the employment standards claim period.
17. No final reply was received from Mr. Dhaliwal.

ANALYSIS

18. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:
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 made.*
19. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
20. As indicated above, King Cobra has grounded this appeal on new evidence becoming available: section 112(1)(c). I therefore need to address whether any of the new evidence submitted by King Cobra will be considered in this appeal.
21. The Tribunal is given discretion to accept or refuse new or additional evidence. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted.
22. I conclude the new evidence submitted with this appeal should not be accepted.
23. It is apparent the document sought to be submitted with the appeal was available at the time the Determination was being made and could have been provided to the Director during the complaint process. The Determination clearly suggests Mr. Dhaliwal made little or no effort to participate in the complaint process and no reason for the failure to provide this document is given. Accordingly, neither the ground of appeal nor the primary consideration for admitting evidence into an appeal has been established.
24. As well, having failed or refused to participate in the complaint process, King Cobra's attempt to enter and argue "new" evidence in this appeal flies in the face of the long standing approach by the Tribunal to such attempts in similar circumstances: see *Tri-West Tractor Ltd.*, BC EST # D268/96 and *Kaiser Stables Ltd.*, BC EST # D058/97. In this case, the Director unsuccessfully attempted to have King Cobra, through Mr. Dhaliwal, provide specific information relating to what had been paid to Mr. Bullar and Mr. Rai. It would be inconsistent with the objects and purposes of the *Act* to allow Mr. Dhaliwal to ignore the Director's efforts and seek to have the Tribunal consider and give effect to evidence which should have been provided to the Director during the complaint process.
25. In result, King Cobra has not met the burden of establishing any legitimate ground of appeal or any basis for varying the Determination as requested and the appeal is dismissed.

ORDER

26. Pursuant to Section 115, I order the Determination dated April 27, 2010 be confirmed in the amount of \$6,448.05, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal