

An appeal

- by -

Virtu@ally Canadian Inc. operating as Virtually Canadian Inc.
("VCI")

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2004A/49

DATE OF DECISION: May 21, 2004

The Director found Filewood was an employee of VCI and applying Section 16 of the *Act*, was owed wages for all hours worked, less the amount of commission wages he had been paid during his employment.

The Director indicated that the task of determining the number of hours worked by Filewood was complicated by the failure of VCI to keep proper records, as required by Section 28, and by the absence of any original and contemporaneous record kept by Filewood. Based on all the evidence, however, the Director accepted Filewood's record were the "best evidence" and concluded he had worked a total of 183 hours during his employment. The Director calculated the wages owing on those hours using the minimum wage rate found in the *Employment Standards Regulations* (the "*Regulations*").

The Director found VCI had contravened Sections 16, by failing to pay Filewood at least the minimum wage, Section 18, by failing to pay Filewood all wages owed within 48 hours after VCI terminated his employment, Section 28, by failing to keep the required records and Section 58, by failing to pay annual vacation pay in an amount of at least 4% of gross wages.

ARGUMENT AND ANALYSIS

The burden is on VCI, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. Placing the burden on the appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation.

The grounds upon which an appeal may be made are 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.*

VCI argues the Director failed to observe principles of natural justice in two respects: first, by "throwing out a commonly used practice of paying commission for sales" and by charging two administrative penalties for non-payment of a salary that was never agreed to by VCI and Filewood and by charging a further penalty for not paying annual vacation pay of \$58.56. VCI says these administrative penalties, in the amount of \$500.00 for each contravention, were excessive and unjustly punitive.

VCI also disputes the finding of the Director on the number of hours worked by Filewood, arguing that finding is not consistent with what Filewood initially claimed he was owed by VCI on an earlier invoice.

Finally, VCI objects to the finding that Filewood was an employee of VCI, arguing the Director failed to take into account evidence showing Filewood never had set start and finish times, left the office for

periods of time during the day and, generally, never maintained a schedule that would be expected of an employee.

In response, the Director has provided the Record. There is no dispute about the sufficiency of the Record provided although VCI filed a “supporting document” with its final submission. I have not considered this document, as it does not meet the criteria for what will be accepted by the Tribunal as new, or additional, evidence on an appeal.

I shall address each of the areas of dispute raised by VCI in their appeal.

Minimum Wage

The Determination states:

Section 16 of the *Act* entitles employees to at least minimum wage (\$8.00 an hour) for all hours worked.

The Determination also set out Section 4 of the *Act*, which makes any agreement to waive the minimum requirements of the *Act* to be of no effect. The suggestion by VCI that the Director “threw out” the commission sales structure is not entirely accurate.

The Act does not provide a minimum “commission” wage. It provides a minimum wage that is expressed as an hourly rate. The Director, as she was statutorily required to do, applied provisions of the *Act* to ensure Filewood was paid minimum wage, which in the circumstances meant “topping up” what Filewood earned in commissions with the minimum wage set out in the *Regulations* for the number of hours he worked. The Director made no error in that regard – it was a result dictated by provisions of the *Act*, and could not be overridden by any agreement between VCI and Filewood.

Employment Relationship

I have reviewed the analysis in the Determination on this matter and can find no error. The Director correctly noted, and considered, the definition of employee in Section 1 of the *Act*, considered other relevant statutory provisions and purposes and found assistance and direction in some of the traditional common law tests.

The decision of the Director on this matter is predominantly based on findings of fact, which except in limited circumstances which do not exist here, may not be reviewed by the Tribunal on appeal. To meet its burden and bring this matter within one of the grounds of appeal set out in Section 112, VCI must show either there was no evidence at all to support the findings of fact made or that a view of the facts was taken by the Director that could not reasonably be entertained based on the evidence that was before the Director (see *Gemex Developments Corp. -and- Assessor of Area #12 - Coquitlam*, [1998] B.C.J. No. 2275 (BCCA)). They have not satisfied this burden.

Even accepting VCI’s argument that Filewood’s work schedule did not look like that of an employee, the Determination outlines an adequate factual basis for finding he was an employee for the purposes of the *Act*.

Time Worked

For similar reasons to the above, I am unable to accept or consider this aspect of the appeal. The Director's finding on the numbers of hours worked by Filewood is simply a finding of fact made on a consideration and weighing of the evidence provided by the parties on this point. It is apparent the Director was not completely satisfied with the information provided by either party, but decided Filewood's record was the best evidence. It was not successfully challenged by the employer and was accorded some weight by the evidence of a witness for the employer.

Administrative Penalties

VCI has not shown the Director committed any error in finding Sections 16, 18, 28 and 58 of the *Act* were contravened by them.

Section 29 of the *Regulations* is part of the regulatory scheme administered by the Director and designed to effect compliance with the requirements of the legislation. The words of subsection 29(1) of the *Regulations* are clear: "*a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act, must pay the following administrative penalty: . . .*" (emphasis added). The provision provides for mandatory administrative penalties without exception where a contravention of the *Act* or *Regulations* is found by the Director.

I appreciate that in some cases the application of the provisions relating to administrative penalties may seem excessive and punitive, but I must apply the law as it is and such considerations do not allow the Tribunal to ignore the clear direction in the legislation.

For the above reasons, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 18, 2004 be confirmed in the amount of \$3,383.18, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal