

An appeal

- by -

Malkit Singh Enterprises Ltd.

- 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 Groves

FILE No.: 2006A/65

DATE OF DECISION: August 4, 2006

day window prescribed in section 17 of the *Act* on nine previous occasions, with the most recent contravention occurring with respect to the pay period ending September 24, 2005.

- The Employer was mailed a letter on March 16, 2006 providing it with an opportunity to respond to the observations that were made by the Branch upon the review of the records.
- On March 24, 2006, the principal of the Employer hand delivered a written response to the Branch. According to the Delegate, it contained two explanations for the late payments of wages. First, it stated that the third party payroll processing contractor which the Employer had retained to process its payroll had had problems with its computer on occasion, which had caused delay, and that in any event the contractor required at least eight days to process the payments. Second, it advised that the principal of the Employer had experienced health problems during the previous year and had only continued operating the business at the request of the employees.
- The Employer's response further acknowledged that employees had been paid late, but contended that the employees had agreed to this. The response included the signatures of several of the employees confirming same.

6. The Delegate considered the Employer's explanations. He must have, because he specifically rejected them as irrelevant. In doing so, he stated that the wording of section 17 was unambiguous, that it was the Employer's responsibility to make sure that all its employees were paid semi-monthly, and within eight days of the end of a pay period. He also decided that in the circumstances of this case, any agreement of the employees to waive the mandatory requirements of section 17 was of no effect, due to the wording of section 4 of the *Act*.
7. In the result, the Delegate determined that the Employer had contravened section 17 of the *Act* on an ongoing basis. However, in order to set the date of the contravention for the purposes of section 29 of the *Regulation*, and the imposition of the administrative penalty, the Delegate selected the most recent contravention, being the late payment in respect of the pay period ending September 24, 2005. That meant that the date of the contravention was October 3, 2005, the day after the employees should have been paid, but were not.
8. The Employer's appeal asserts that the Determination should be cancelled because the Delegate failed to observe the principles of natural justice in making the Determination.

ISSUE

9. Can it be said that the Employer has demonstrated any ground on which the Determination should be varied or cancelled, or the matter referred back to the Director for further consideration?

ANALYSIS

10. The Tribunal's jurisdiction with respect to appeals is set out in section 112(1) of the *Act*, which provides that a person served with a determination may appeal it 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.
11. Here, the Employer alleges on its Appeal Form that there was a failure to observe the principles of natural justice in the making of the Determination. In general, such a challenge gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in an appellant's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence (see *Moon Arc Interiors Co. Ltd.* BC EST #D200/04).
12. In the context of proceedings under the *Act*, the obligation to observe the principles of natural justice is informed by the language of section 77, which reads:
77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.
13. My review of the written materials filed by both parties on this appeal has persuaded me that the Employer has failed to show that it was denied an opportunity to know the case being alleged against it, or a reasonable opportunity to respond in its own defence. Nowhere does the Employer assert that it was unaware that the Delegate's concern related to the late payment of wages. According to the Delegate's Reasons for the Determination, the Employer made submissions to the Delegate in response to that concern before the Determination was made. The Delegate's description of that submission coincides with the written submission delivered by the Employer in support of this appeal. There is no suggestion that the Delegate considered evidence, or submissions, of which the Employer was not apprised. Indeed, it appears that the material on the basis of which the Delegate made his Determination was the Employer's own payroll record information, and the submissions made on behalf of the Employer to the Delegate during the course of the Delegate's investigation.
14. In my opinion, this appeal is not about a breach of natural justice at all. Instead, I believe that at its heart this appeal is concerned with a question of law. This is so because it is not the process itself of which the Employer complains, but rather the fact that the Delegate did not accept the explanations given by the Employer for paying its employees late. In my opinion, that type of challenge raises a question of law. That question is whether the explanations for the late payment of wages put forward by the Employer are sufficient in law to warrant my deciding that the Determination should be varied or cancelled, or the matter referred back to the Director for consideration afresh.
15. Does the fact that the Employer did not assert an error in law on its Appeal Form preclude me from considering whether such an error has been made? Clearly not. While the Employer did not formally

indicate that it intended to raise an error of law as a basis for its appeal, the Tribunal will seek to discern the true basis for a challenge to the Determination, in order to do justice to the parties, regardless of the particular box an appellant has checked off on the Appeal Form (see *Triple S Transmission Inc.* BC EST #D141/03).

16. The Delegate's investigation revealed that the Employer was in violation of section 17(1) of the *Act*, which reads:

17.(1) At least semi-monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

17. The Employer has admitted that it paid its employees late. In the material filed with the Tribunal in support of its Appeal Form the Employer provides three explanations by way of justification. The first two reprise the submissions the Delegate says he received from the Employer prior to the Delegate's issuing the Determination. First, the Employer says that the third party payroll processing contractor it retained to perform its payroll function took too long to process the payroll, often because the contractor's computers were "down". Second, the principal of the Employer says that he suffered an illness, and wanted to close the business, but his employees insisted he continue. He says they never complained of any delay in payment of their wages. In support, the Employer attaches a note from a physician, and a document marked "To Whom It May Concern" signed by various employees. Finally, the Employer states that it was unaware there had been a contravention.
18. Are any of these justifications sufficient to warrant my varying or cancelling the Determination, or referring the matter back to the Director for consideration afresh? In my opinion, they are not.
19. It is the Employer's obligation to ensure that it has complied with the *Act*. The fact that wages may have been paid late because the payroll processing contractor's computer went "down", or that it may have required more than eight days to process the payroll, is of no moment. The responsibility for the failure of an agent to provide the necessary service remains with the Employer. Its failure to do so cannot be a defence to the clear prescription embodied in section 17 of the *Act* even if, as the Employer asserts, the Employer was unaware that contraventions had occurred through the default of the agent.
20. Nor can it be a defence that the principal of the Employer may have suffered an illness, and wished to wind up the business, but was persuaded to continue by his employees. Any such inducement on the part of the employees must be deemed to have been based on a desire that the business be continued, but that it be continued in compliance with the *Act*.
21. The suggestion that the Employer should be relieved of its responsibility because employees may have consented to late payment of their wages is also without merit. As section 4 of the *Act* makes clear, the requirements of the legislation are minimum requirements, and an agreement to waive any of them, absent circumstances which are inapplicable here, has no effect. It is entirely irrelevant, therefore, that some of the employees may have been content to receive their wages late.
22. These observations are sufficient to dispose of the appeal. However, I do not wish to end this discussion without making some comments concerning the content of the record which was supplied by the Delegate to the Tribunal for the purposes of this appeal. That record consisted of a copy of the payroll records for two employees of the Employer and a copy of the direct deposit record for the pay period ending September 24, 2005.

23. Section 112(5) of the *Act* requires that upon receipt of a copy of an appellant's request for appeal, the Director must provide the Tribunal with the record that was before the Director at the time the determination in question was made, including any witness statement and document considered by the Director. As this Tribunal stated in *Super Save Disposal Inc.* BC EST #D100/04, while an appeal pursuant to section 112 is not, strictly speaking, an appeal on the record, the fact that the proceedings before the Tribunal do not constitute a hearing *de novo* means that the completeness of the record is now much more important than was formerly the case when the *Act* did not provide for specified grounds of appeal. That authority also states that where, as here, a determination results from an investigation, rather than an oral hearing, the Director's obligation to disclose the materials considered prior to the issuance of the determination may, arguably, be broader.
24. In this instance, it is obvious from the materials I have received that the complete record was not produced to the Tribunal by the Delegate. The Delegate's Reasons for the Determination refer specifically to two letters which are not before me. They are the letter sent to the Employer on March 16, 2006 setting out the Director's concerns arising from the examination of the Employer's records, and the written response the Delegate indicates the Employer delivered to the Branch on March 24, 2006.
25. The following passage from *Super Save, supra*, is apposite:
- In my view, when defining the ambit of the section 112(5) record, the governing principle should not be *reliance* or *materiality* – that is, did the delegate rely on the document or was it material to the delegate's decision? Rather, the governing principle should be *availability* – that is, was the document etc. in the hands of the delegate when he or she was making the determination? ("*...the record that was before the director at the time the determination...was made*"). It should be noted that a document may have been available notwithstanding that the delegate did not rely on that document when making his or her determination (say, because the delegate considered it to be irrelevant or not probative).
- Counsel for the Director submits that only documents actually considered to be relevant and relied on by the delegate constitute the record; I reject that submission as being overly narrow. In my opinion, a document is "considered by the delegate" even though the delegate may conclude that it is not relevant. One must "consider" a document before one can conclude whether it is relevant...
- ...
- If a determination is issued following an independent factfinding investigation by a Director's delegate, the record consists of all documents submitted by (or on behalf of) the parties to the delegate and, in addition, any other documents obtained by, or on behalf of, the delegate during the course of the investigation. Where, as in the present case, more than one delegate had conduct of the matter, the record consists of all documents submitted to, or obtained by, any delegate who had conduct of the file.
26. In this case, I believe the March 2006 correspondence to which I have referred was certainly available. It must also have been highly material. It should, therefore, have been included in the body of the record forwarded by the Delegate to the Tribunal, along with all other documents before him at the time the Determination was made.
27. Having said that, I am not persuaded that the failure to produce the entire record has tainted the result in this particular appeal. My reasons for coming to this conclusion are that the Employer has made no objection to the documents that were produced by the Delegate, from which I infer that the Employer

does not take the position that there are other documents in the hands of the Delegate which I must see in order to decide the appeal. Further, it appears from the Delegate's description of the correspondence in question, which appears in the Delegate's Reasons, that it conforms in substance with what was said in the written submissions delivered to the Tribunal by the Employer, and the Delegate, for the purposes of this appeal.

ORDER

28. For the above reasons, and pursuant to section 115 of the *Act*, I order that the Determination dated April 13, 2006 be confirmed.

Robert Groves
Member
Employment Standards Tribunal