

An appeal

- by -

Forwardthink Media Inc. carrying on business as The Block Magazine
("Block Magazine")

- 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.: 2008A/75

DATE OF DECISION: September 2, 2008

DECISION

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Forwardthink Media Inc. carrying on business as The Block Magazine (“Block Magazine”) of a determination that was issued on May 30, 2008 (the “Determination”) by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”).
2. The Determination concluded that Block Magazine contravened Section 18 of the Act by failing to pay its former employee Alisha Tokarek (“Tokarek”) wages of \$1,386.20 and ordered Block Magazine to pay Tokarek the said amount plus interest of \$74.36 thereon pursuant to Section 88 of the Act.
3. The Determination also imposed an administrative penalty of \$500.00 on Block Magazine pursuant to Section 29(1) of the *Employment Standards Regulation* (“Regulation”) for its breach of Section 18 of the Act.
4. Block Magazine, through one of its directors, a Mr. Evan Ho (“Ho”), appeals the Determination pursuant to Section 112(1)(c) of the Act stating that new evidence has become available that was not available at the time the Determination was being made. I propose to set out the alleged “new evidence” under the heading “Block Magazine’s Submissions” herein.
5. Block Magazine is seeking the Tribunal to cancel the Determination.
6. Block Magazine has not requested an oral hearing of the Appeal. Pursuant to Section 36 of the *Administrative Tribunal’s 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. In my view, this Appeal may be adjudicated on the written submissions of the parties without resorting to an oral hearing. Accordingly, I will decide the Appeal based on the Section 112(5) “record”, the submissions of the parties and the Reasons for the Determination.

ISSUE

7. The sole issue in this appeal is whether there is evidence that has become available that was not available at the time the Determination was being made, and, if so, does that evidence justify cancelling the Determination.

FACTS

8. Block Magazine operates a publishing business and employed Tokarek as a Marketing/Circulation Manager from December 2005 until July 6, 2007 at the rate of pay of \$1,700.00 bi-weekly.
9. On December 7, 2007, Tokarek filed a complaint pursuant Section 74 of the Act alleging that Block Magazine contravened the Act by failing to pay her regular wages (the “Complaint”).

10. In the Complaint form, Tokarek notes that her paycheque of June 30, 2007 from Block Magazine for \$1,386.20 “bounced”. She further indicates that Ho promised to replace the cheque “on many occasions over the past few months, but fail(ed) to do so”. She also notes in the Complaint that Ho “bounced many cheques over the years” and while he replaced the bounced cheques for other employees, he did not replace her “bounced” cheque and therefore she quit.
11. The Delegate notes in the Determination that she had telephone conversations with Tokarek wherein the latter reiterated the details of her Complaint and indicated that she was unsuccessful in attempting to communicate directly with Block Magazine in order to have the “bounced” cheque replaced.
12. In the Determination, the Delegate notes that she contacted Block Magazine “by telephone, fax, email and registered mail”. With respect to telephone communications, the Section 112(5) record shows numerous attempts by the Delegate to contact Block Magazine, including notes of discussions with Ho at Block Magazine, wherein she notified Ho of the details of the Complaint and provided Block Magazine an opportunity to respond. The Delegate notes that Block Magazine did not refute that the wages claimed in the Complaint were owed to Tokarek but indicated that it was engaged in some proceedings with Canada Revenue Agency which, according to Block Magazine, were required to be resolved prior to Block Magazine deciding how and where Tokarek’s wages would be directed.
13. The Delegate indicates further in the Determination that she provided Block Magazine “with an opportunity to provide evidence confirming the details, relevance and stage of the [Canada Revenue Agency] proceedings”, but Block Magazine did not respond or provide any details. As a result, the Delegate states she sent a registered letter dated April 18, 2008 containing her preliminary findings (the “Letter”) to Block Magazine and further emailed the Letter to Ho. There is an email record indicating that the email to Ho containing the Letter was opened or received on the same date and in any event, there is no dispute from Block Magazine about the receipt of the email or the Letter.
14. The Letter set out the Delegate’s preliminary findings that Block Magazine owed Tokarek \$1,386.20 and if the former did not pay the said wages to Tokarek by May 1, 2008, the Delegate would issue a written decision against Block Magazine ordering payment of the outstanding amount and interest thereon as well as an administrative penalty. As Block Magazine did not respond to the Letter, the Delegate proceeded with the making the Determination based on her preliminary findings in the Letter.

SUBMISSIONS OF BLOCK MAGAZINE

15. Block Magazine, as previously indicated, appeals on the basis that new evidence has become available that was not available at the time the Determination was being made. In support of this ground of appeal, Block Magazine states that Canada Revenue Agency sent Block Magazine a letter dated April 17, 2008 advising that its examiner wished to review Block Magazine’s records for the purposes related to the *Income Tax Act*, Canada Pension Plan, *Employment Insurance Act* and the *Excise Tax Act*. A copy of the said letter is attached to the Appeal submissions of Block Magazine and it states, *inter alia*:

“We request that you have the following information at your place of business on April 23, 2008 at 2:00 p.m. If this date is not convenient, please contact the undersigned before April 21, 2008 to arrange a mutually satisfactory date.”

16. The specific information Revenue Canada requested to examine included: “November 2007 to Present Bank Statements and cancelled cheques”; “listing of payments of James Tobler, Susan Falk, Kris

Blizzard, Danielle Cappellaro, Wendy Bedard, Rod Bedard & Brad Peacock from November 2007 to Present”; and “Listing of payments to Dean Pothitos from January 2006 to Present”.

17. Subsequently, Block Magazine states that on May 7, 2008, Revenue Canada served Block Magazine with an Examiner’s Statement of Accounts and Tokarek “was not included in the Examiner’s final investigation” although Tokarek was an employee of Block Magazine during the period January to June 2007 “based on Revenue Canada’s standards”. As a result, Ho indicates in the submissions, that he contacted Block Magazine’s accountant and lawyer to discuss “the fact that Revenue Canada missed one staff member and ... concluded that [Block Magazine] must inform Revenue Canada that Alisha Tokarek was in fact an employee during 2007”. However, Ho states that he has not had a chance to leave a message for Revenue Canada’s examiner involved in this case “to inform him that Alisha Tokarek should be considered an employee”. Ho further submits that Block Magazine intends “to make all CPP and EI premium payments on behalf Alisha Tokarek” and accordingly “the amount owing to Alisha will be part of the CPP and EI contributions”. In closing, Ho, on behalf of Block Magazine, requests “more time to arrange another meeting” with the Revenue Canada’s examiner for this purpose.

DIRECTOR’S SUBMISSIONS

18. The Director submits that Block Magazine’s appeal is baseless and without merit and should be dismissed.
19. With respect to Block Magazine’s request for additional time to deal with Revenue Canada and eventually make CPP and EI premium payments on behalf of Tokarek, the Director submits that Block Magazine’s “relationship and obligations in this respect are between [Block Magazine] and Canada Revenue Agency”.

ANALYSIS

20. As Block Magazine’s appeal is based on the “new evidence” ground of appeal, it is important first to examine whether Block Magazine’s purported new evidence meets the four-fold criteria for considering new evidence on appeal in *Re Merilus Technologies Inc.*, B.C.E.S.T. #D171/03. In *Re Merilus Technologies* the Tribunal set out the following conjunctive requirements that the appellant wishing to adduce new evidence must meet or establish before the Tribunal will consider the new evidence:
- 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;
 - the evidence must have had 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.

21. In this case, having reviewed Block Magazine's purported new evidence, I find that Block Magazine fails to satisfy the four qualifying tests in *Re Merilus Technologies* to persuade this tribunal to consider the purported new evidence. In my view, Block Management fails on all four tests.
22. First, the proposed evidence of Revenue Canada's investigation that Block Magazine wishes to introduce as new evidence was available during the investigation of the Complaint and before the Determination was made. More specifically, Block Magazine wishes to rely upon Revenue Canada's letter of April 17, 2008, advising Block Magazine of Revenue Canada's intention to conduct an examination of certain records of Block Magazine and the subsequent Examiner's Statement of Account dated May 7, 2007 issued to Block Magazine. Both these documents existed during the investigation of the Complaint and before the Determination of May 30, 2008. There is no explanation why neither of these documents was produced or communicated to the Delegate during the investigation of the Complaint and before the Determination was made, particularly when Block Magazine was issued the Delegate's preliminary findings in the Letter of April 18, 2008. In my view, Block Magazine fails on the first of the four-part test for new evidence and while I need not consider the balance of the tests, I propose to do so to make certain important observations.
23. Second, the said documents from Revenue Canada that Block Magazine is relying upon as new evidence, in my view, are not relevant to a material issue arising from the Complaint. The material issue in the Complaint is whether Block Magazine owes Tokarek \$1,386.20 for the pay period June 15 to June 30, 2007. The Delegate, in my view, correctly notes in the Determination and it continues to be unchallenged by Block Magazine in its Appeal, that Tokarek is owed \$1,386.20 for the pay period June 15 to June 30, 2007. The matter of Block Magazine's failure or inadvertence or mistake to show Tokarek in its records as an employee for the purpose of its dealings with Revenue Canada and more specifically its obligations to make submission on account of EI and CPP payments for Tokarek is irrelevant to the issue of its obligation to pay outstanding wages to Tokarek.
24. Third, while I do not question the veracity of the documents from Revenue Canada, I find it incredulous that Ho would state in the appeal submissions (filed some two months after Revenue Canada's May 7, 2008 Examiner's Statement of Account) that he has "not had a chance to leave a message" for the Examiner ... to inform him that Alisha Tokarek should be considered an employee" and Block Magazine intends to make CPP and EI premium payments on her behalf. There is absolutely no explanation of why Block Management and Ho have failed to contact the examiner with Revenue Canada for almost two months to deal with the matter of payment of EI and CPP premiums for Tokarek. It is apparent to me that Block Magazine simply wants to delay further the payment of wages it should have made to Tokarek in excess of a year ago without any basis.
25. Finally, the Revenue Canada documents that Block Magazine is relying upon as new evidence, in my view, do not have high potential probative value such that, if believed, could have led the Director to a different conclusion on the sole material issue in this case. In my view, Revenue Canada's decision to audit or examine the records of Block Magazine, and the latter's subsequent decision to want to inform Revenue Canada that Tokarek should be considered an employee and pay CPP and EI payments for her out of her outstanding wages does not extinguish Block Magazine's liability under Section 18 of the Act to pay Tokarek her wages in a timely fashion upon the termination her employment.
26. I find that Block Magazine has failed to fulfill any of the conjunctive requirements of the four-part test for adducing new evidence in *Re Merilus Technologies* and accordingly I dismiss Block Magazine's appeal.

ORDER

27. Pursuant to Section 115 of the Act, I order that the Determination be confirmed as issued in the amount of \$1,386.20 together with whatever additional interest may have accrued pursuant to Section 88 of the Act since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal