

An appeal

- by -

MBM Holdings Ltd.
(“MBM”)

- 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: Carol L. Roberts

FILE No.: 2015A/88

DATE OF DECISION: August 27, 2015

DECISION

SUBMISSIONS

Carol O'Dell

agent for MBM Holdings Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), MBM Holdings Ltd. (“MBM”) has filed an appeal of a Determination of the Director of Employment Standards (the “Director”) issued on June 12, 2015. In that Determination, the Director found that MBM had contravened sections 17, 18, 40, 45, 58, and 21 of the *Act* in failing to pay its former employee, Jonathon L. Getten (“Mr. Getten”), \$2,720.19, representing wages, MBM business costs and interest. The Director also imposed six administrative penalties in the total amount of \$3,000 for the contraventions, for a total amount owing of \$5,720.19.
2. MBM appeals the Determination on the grounds that evidence has become available that was not available at the time the Determination was made.
3. This decision is based on MBM’s submissions, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.

FACTS AND ARGUMENT

4. On December 18, 2014, Mr. Getten filed a complaint with the Employment Standards Branch (the “Branch”) alleging that MBM had contravened the *Act* by failing to pay him regular and overtime wages and statutory holiday pay. He also alleged that MBM did not refund him for an expense he paid for on behalf of the business.
5. On April 8, 2015, a delegate of the Director contacted Oscar Mikszan (“Mr. Mikszan”), MBM’s sole director, by telephone, advising him of Mr. Getten’s complaint and offering MBM the opportunity to attempt to resolve the complaint by mediation. A Notice of Mediation and Mr. Getten’s complaint form were sent to MBM by mail with a copy to Mr. Mikszan by e-mail. The mediation was set for April 30, 2015. The Notice indicated that in the event the complaint was not resolved by mediation, a hearing would take place on June 11, 2015.
6. Neither Mr. Mikszan nor any other MBM representative attended the mediation. The mediator spoke to Mr. Mikszan on May 12, 2015, to discuss the complaint, the legislation and the complaint resolution process. Later that day, a Notice of Complaint hearing was sent to MBM by registered mail, with a copy to Mr. Mikszan by e-mail. The Notice provided details about the hearing and dial-in information. The Notice further indicated that in the event a party did not participate, an adjudicator may determine matters based on the information available.
7. Enclosed with the Hearing notice was a Demand for Employer records, which were to be produced to the Branch.
8. MBM did not respond to the Demand for Records, and did not appear at the hearing.

9. Mr. Getten's evidence at the hearing was that he worked for MBM, a general contractor, as a general labourer from January 1, 2014, until June 26, 2014. He maintained his own hours of work for payroll purposes, which he documented on an Excel spreadsheet. This time record was submitted to MBM on a regular basis for payment.
10. In late June 2014, Mr. Getten became frustrated with MBM because he was not receiving sufficient notice about scheduled shifts and because he was not receiving all wage payments on a bi-weekly basis. In late June, Mr. Getten informed MBM that he would be unable to work on June 27, 2014, due to an appointment. On June 26, 2014, MBM told Mr. Getten that he was required to work the following day. Mr. Getten refused to cancel his appointment and after further discussion, quit his employment.
11. Mr. Getten said that he received no wages for the month of June, and that MBM would not return his telephone calls to discuss wages. He provided the delegate with a copy of his time record in support of his record of hours. Mr. Getten also said that MBM had not paid him statutory holiday pay.
12. Finally, Mr. Getten said that MBM did not provide him with a fuel card for its work truck and that on occasion, he was required to purchase fuel for either the work truck or a pressure washer. He said that he purchased fuel on June 19, 2014, for which he was not reimbursed.
13. The delegate concluded that MBM was given the opportunity to respond to Mr. Getten's complaint and that, although MBM was aware of the complaint, MBM did not appear at the mediation or the hearing.
14. The delegate noted that MBM failed to comply with a Demand for Records, and accepted Mr. Getten's evidence about his hours of work and outstanding wages. The delegate also found MBM had failed to pay Mr. Getten statutory holiday pay. Finally, the delegate accepted Mr. Getten's evidence that he had not been reimbursed for fuel, which was MBM's business cost, contrary to section 21 of the *Act*.

Argument

15. MBM says that although a delegate contacted Mr. Mikszan and advised him about Mr. Getten's complaint, MBM was never contacted about the hearing. MBM says Mr. Mikszan was available for any necessary telephone conference calls.
16. Further, MBM says that, during his discussion with the Branch delegate, Mr. Mikszan explained that Mr. Getten was never an employee but a contractor who billed for his services. In support of this assertion, MBM attached a number of bills submitted by Mr. Getten, marked "paid." MBM says if Mr. Getten is owed additional money, he has neither billed for it nor made any effort to discuss any outstanding amounts with Mr. Mikszan.
17. MBM further says that the Hearing Notice and Demand for Records were never received as they were sent to an incorrect address.
18. Finally, MBM says that after checking the phone records of Mr. Mikszan, it found no telephone calls or e-mails from the delegate.
19. MBM says that it had no opportunity to provide information in response to the complaint due to the delegate sending the documentation to an incorrect mailing address and seeks to have a new hearing.

ANALYSIS

20. Section 112(1) of the *Act* provides that a person may appeal a determination on 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.

21. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission Inc.*, (BC EST # D141/03), while:

... most lawyers generally understand the fundamental principles underlying the “rules of natural justice” or what sort of error amounts to an “error of law”, these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular “box” that an appellant has--often without a full, or even any, understanding--simply checked off.

The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive “fair treatment” [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant’s explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

22. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not MBM has demonstrated any basis for the Tribunal to interfere with the Determination.

Failure to observe the principles of natural justice

23. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

24. Although MBM says it had no notice of the hearing, the record indicates otherwise.

25. Mr. Getten completed a self-help kit with a Request for Payment on November 23, 2014. Canada Post records indicate that the Request, which was sent by Registered Mail to an address in Abbotsford, was unclaimed. After Mr. Getten filed his complaint, the Branch sent a Notice of Mediation by e-mail to Mr. Mikszan. The Branch’s e-mail delivery system suggests that the e-mail was successfully delivered.

26. The record also indicates that the delegate sent a Demand for Records along with information on the complaint hearing by Registered Mail to an address in Abbotsford. The e-mail delivery system also indicates that the same information was successfully sent to Mr. Mikszan by e-mail. Although it does appear that the Demand and hearing notice were sent to an address different from the Records and Registered Office, it was nevertheless successfully delivered. Canada Post tracking information indicates that the documents were successfully delivered and signed for by Mr. Mikszan.

27. MBM does not dispute that Mr. Mikszan was made aware of the complaint and hearing process by telephone. It is difficult to understand why Mr. Mikszan would not attempt to follow up with the Branch had he in fact not received any documentation by e-mail or regular mail.
28. I am satisfied that MBM was aware of the allegations against it as well as the opportunity to respond. I find no denial of natural justice.

Error of law

29. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
30. Having reviewed the record, I find no error of law in the Determination. The delegate found Mr. Getten’s evidence to be the best evidence, and made a finding based on that evidence. I also find that the delegate properly considered the evidence in light of the requirements of the *Act*.
31. I find this ground of appeal has not been established.

New evidence

32. MBM submitted new documentation in support of its ground of appeal consisting of what appear to be invoices prepared by Mr. Getten for payment for periods between January 27, 2014, and June 26, 2014. The last invoice include a claim for fuel for power washing the truck in the amount of \$66.28, which corresponds to the amount Mr. Getten claimed at the hearing.
33. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) 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;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) 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.

34. The invoices, which were submitted as new evidence, were clearly available during the adjudication of Mr. Getten's complaint. I conclude that MBM had many opportunities to appear and submit this evidence in support of its position that Mr. Getten was a self-employed contractor and that he was paid all wages.
35. While the invoices are relevant to the issues before the delegate, I am not persuaded that they would have led him to a different conclusion on the material issue. While all of the invoices are marked "paid", MBM provided no evidence, either by way of a receipt, cancelled cheque or other bank transaction, that would lead the decision maker to conclude that Mr. Getten was paid for the days he claimed or reimbursed for MBM's business costs.
36. I find no basis for this ground of appeal.
37. The appeal is dismissed.

ORDER

38. Pursuant to section 115 of the *Act*, I deny the appeal. I Order that the Determination, dated June 12, 2015, be confirmed in the amount of \$5,720.19 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal