

An appeal

- by -

Bankers Inventory Inc.  
("Bankers")

– 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)

and

An application for suspension

- by -

Bankers Inventory Inc.  
("Bankers")

– of a Determination issued by –

The Director of Employment Standards  
(the "Director")

Pursuant to section 113 of the  
*Employment Standards Act* R.S.B.C. 1996, C. 113 (as amended)

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2010A/99 & 2010A/100

**DATE OF DECISION:** September 13, 2010

## DECISION

### SUBMISSIONS

Alvin Zipursky on behalf of Bankers Inventory Inc.  
Joe LeBlanc 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 Bankers Inventory Inc. (“Bankers”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 7, 2010.
2. The Determination was made by the Director on a complaint filed by Shaun Kernahan (“Kernahan”), who alleged Bankers had contravened the *Act* by failing to pay regular wages, commission wages, overtime wages and annual and statutory holiday pay. The Determination found that Bankers had contravened Part 3, sections 18 and 21, Part 4, section 40, Part 5, section 46 and Part 7, section 58 of the *Act* and ordered Bankers to pay Kernahan \$1,206.29, an amount which included wages and interest.
3. The Director also imposed administrative penalties on Bankers under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$2,500.00.
4. The total amount of the Determination is \$3,706.29.
5. Bankers has appealed the Determination on the grounds the Director erred in law and failed to observe principles of natural justice in making the Determination and seeks to have the Determination cancelled. Bankers also seeks a suspension of the Determination under section 113 of the *Act* pending the outcome of the appeal. While the appeal does not indicate it is based on evidence becoming available, Bankers has submitted an unsworn statement from Alain Vallerand and some photographs that were not provided to the Director during the complaint process.
6. Bankers has requested an oral hearing on this appeal. 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. The Tribunal has decided an oral hearing is not necessary. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

### ISSUE

7. The issues in this appeal are whether the Director erred in law and/or failed to observe principles of natural justice in making the Determination.

### THE FACTS

8. Bankers operates a liquidation business in Vancouver. Kernahan was employed by Bankers as a labourer/salesperson from August 6, 2009, to October 16, 2009. Following the termination of his

employment, Kernahan filed a complaint with the Director claiming Bankers had failed to pay him all wages owed. He claimed regular wages, including commission wages and a performance related bonus, overtime, annual vacation pay and statutory holiday pay. Bankers did not agree Kernahan was entitled to any additional amounts beyond what he had already received.

9. The Director held a complaint hearing by teleconference, during which evidence was given by Kernahan, by a witness provided by Kernahan and by Mr. Zipursky, the principal of Bankers.
10. The Director found Kernahan was entitled to regular and overtime wages, but in an amount less than claimed by Kernahan, annual and statutory holiday pay and an amount of \$15.00 that had been deducted from his final pay to cover the cost to Bankers of a cheque it had stopped payment on. The Director denied Kernahan's claim for commission wages and a bonus, finding there was insufficient evidence to support a conclusion these matters were agreed to be part of his compensation.
11. The Director accepted a record of hours submitted by Bankers, albeit primarily based on information provided by Kernahan, as being a credible and accurate reflection of Kernahan's hours worked and used that record to calculate any entitlement Kernahan might have had under the *Act*. The Determination notes that Mr. Zipursky did not question Kernahan on the records and took them as accurate.

## **ARGUMENT**

12. Bankers says the Director erred in law by failing to adjust the hours Kernahan claimed he worked to account for lunch and coffee breaks. Bankers argues the Director should have seen the breaks were not taken off when the record of hours worked were evaluated and then made the adjustment.
13. Bankers says the Director failed to observe principles of natural justice by failing to consider Kernahan's conduct and exaggerated claims in assessing his entitlement to any additional wages. Bankers particularly points to the circumstances it says caused them to stop payment on the final wage cheque it had given to Kernahan following the termination of his employment.
14. Bankers disagrees with the penalties imposed by the Director, submitting it is unjust they should be penalized because Kernahan, fraudulently in Bankers' view, tried to cash his final cheque and had consistently failed to prepare his hour sheets on time. Bankers also submits there were other aspects of Kernahan's conduct that should have affected the administrative penalties imposed by the Director.
15. The Director says, in response to the alleged error of law, that there was no evidence provided during the complaint process showing the hours given to Bankers by Kernahan were not an accurate reflection of the time he worked. The Director notes that when the hours were initially presented by Kernahan to Bankers – 12 days before his employment ended – they were accepted as accurate and continued to be accepted by them as accurate throughout the complaint process. The Director says there was ample opportunity for Bankers to examine whether the hours Kernahan claimed took breaks into account and raise that matter during the complaint process. The Director says the hours were specifically reviewed during the teleconference hearing on the complaint. Neither party raised any issue about the accuracy of those hours.
16. The Director says there was no failure to observe principles of natural justice. Bankers was aware of the claims being made by Kernahan. A complaint hearing was held, both sides were given the opportunity to present their evidence, to call witnesses in support of their case and to cross-examine the other party on their evidence. Both parties were allowed to examine the documents – and there were only two – submitted as evidence and to raise any objection respecting of those documents.

17. The Director says the conclusions reached were based on the evidence provided at the teleconference hearing. The statement of Mr. Vallerand was not provided during the complaint process, even though it was available to Bankers prior to the Determination being made. The Director argues this statement should be ignored.
18. Kernahan filed no response to the appeal.
19. Bankers has filed a brief reply to the response of the Director, but it adds nothing new to the appeal.

## ANALYSIS

20. 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.*
21. 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. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
22. While Bankers has not grounded this appeal on section 112(1) (c) – new evidence becoming available – the statement of Mr. Vallerand and the pictures taken by him have been submitted in support of the appeal. I shall first address whether any of this material will be considered in this appeal.
23. 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.
24. I conclude the new evidence submitted with this appeal should not be accepted.
25. It is apparent the material 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. On that basis it will not be considered. I accept the comment made by the Director; that if Bankers wished to challenge the accuracy of the records of hours worked, there was ample opportunity to do so during the complaint process. As well, the Determination indicates Bankers presented the record of hours worked during the teleconference hearing and accepted them as accurate. Bankers is now seeking to resile from the position on the record of hours taken during the complaint process. In my view, that is inappropriate and should not be allowed in an

appeal. It is not a function of the appeal process to allow a dissatisfied party to raise and develop new avenues of argument on matters that should have and could have been raised in the complaint process.

26. Based on an a review of the Determination and the material in the file, I am not persuaded there was any error of law committed by the Director in accepting the record of hours as accurate and using that record to decide if there were contraventions of the *Act* and, having found contraventions, to also use that record to calculate the wages owed resulting from those contraventions. This ground of appeal is denied.
27. In respect of the argument that the Director failed to observe principles of natural justice in making the Determination, the Tribunal, in *Imperial Limousine Service Ltd.*, BC EST # D014/05, has briefly summarized the natural justice concerns that typically operate in this context:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST # D050/96.

28. In the circumstances of this appeal, Bankers' burden in alleging a failure by the Director to observe principles of natural justice is to provide facts which show they have been denied the procedural rights described above. That burden has not been met. Provided the process applied by the Director exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material before the Tribunal in this appeal Bankers was provided with the opportunity required by section 77 of the *Act* and by principles of natural justice to know the case, to present their position and to respond to the position presented by Kernahan.
29. Principles of natural justice do not require the Director to factor the conduct of the respective parties into the Determination. The Director's task is to determine if there has been compliance with the *Act* and, if there has not, to address that matter. The *Act* does not provide for a balancing of the "equities" between the respective positions of the parties or for using what one party might view as improper conduct by the other party as a basis for denying a statutory right found in the *Act*.
30. This ground of appeal is also denied.
31. Bankers has challenged the administrative penalties imposed under section 29 of the *Regulation*, arguing some of the penalties imposed in this case are not justified when the amount of the contravention is considered. While not specifically stated, the focus of Bankers' position is that a \$500.00 penalty for a contravention amounting to \$15.00 is not fair.
32. I am unable to accept Bankers' position. The legislative scheme provides for mandatory administrative penalties without any exceptions, and without consideration of whether the penalty is fair in the circumstances, where a contravention is found by the Director in a Determination issued under the *Act*: see *Acton Super-Save Gas Stations Ltd.*, BC EST # D067/04. The amount of the administrative penalty is fixed by regulation. The Tribunal has no ability to ignore the plain meaning of the words of a statute and substitute its view of whether the administrative penalties may be set aside based on its judgement about whether they are justified, fair or logical.

33. For the above reasons, the appeal is denied.
34. Based on the above decision, it is unnecessary to consider the request under section 113 of the *Act* to suspend the effect of the Determination pending the outcome of the appeal. There is no longer any factual basis for considering that request, the appeal having been decided.

**ORDER**

35. Pursuant to Section 115, I order the corporate Determination dated June 7, 2010, be confirmed in the amount of \$3,706.29, together with any interest that has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**