

An appeal

- by -

Joel Dela Cruz, carrying on business as Primetop Construction Co.
("Primetop")

- 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: David B. Stevenson

FILE No.: 2007A/88

DATE OF DECISION: October 12, 2007

DECISION

SUBMISSIONS

Joel Dela Cruz	on behalf of Primetop Construction Co.
Daniel MacQuarrie	on his own behalf
John Dafoe	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Primetop Construction Co. (“Primetop”) of a Determination that was issued on July 7, 2007 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Primetop had contravened Part 3, Section 18 and Part 7, Section 58 of the *Act* in respect of the employment of Daniel MacQuarrie (“MacQuarrie”) and ordered Primetop to pay MacQuarrie an amount of \$817.29, an amount which included both wages and interest.
2. The Director also imposed an administrative penalty on Buchan under Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$1000.00.
3. The total amount of the Determination is \$1817.29.
4. Primetop says the Director failed to observe principles of natural justice in making the Determination. New evidence has been submitted with the appeal, comprising six photographs, which Primetop says they have only recently realized they had taken and which they say contradicts part of the claim made by MacQuarrie and accepted in the Determination. Primetop has asked the Tribunal to review, and cancel, the Determination.
5. Primetop has not asked for an oral hearing and the Tribunal is not required to hold an oral hearing. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act*, SBC 2004, ch. 45 (“ATA”), including section 36 which states, in part: “. . . the tribunal may hold any combination of written, electronic and oral hearings” (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).
6. The Tribunal has reviewed the material and the parties’ submissions and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

7. The issue in this appeal is whether Primetop has shown there is any reviewable error in the Determination.

THE FACTS

8. MacQuarrie filed a complaint with the Director alleging he had not been paid all wages earned while working for Primetop during the period November 29 to December 15, 2007. He also claimed he was entitled to be reimbursed for the cost of supplies he purchased for Primetop.
9. In response to the complaint, Primetop took the position that MacQuarrie had not done any work for them after November 20, 2007 and was not owed wages.
10. The Director heard the submissions of the parties, by way of a teleconference hearing on June 11, 2007. It appears that reliance documents were exchanged prior to the hearing. Primetop provided a list of prospective witnesses.
11. The argument and evidence of the respective parties which is outlined in the Determination need not be repeated in this decision. It suffices to say there was contradictory evidence relating to the claim. The Director accepted the evidence of MacQuarrie, citing the “somewhat” conflicting nature and improbability of some of Primetop’s evidence. The Director found, on “the balance of probabilities”, that MacQuarrie did work during the period in question and for the hours he claimed.
12. The Director denied MacQuarrie’s claim for reimbursement of the supplies as he was unable to provide evidence showing either the cost or that he had bought them.

ARGUMENT AND ANALYSIS

13. 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.*
14. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds. Primetop has raised two grounds of appeal.
15. First, Primetop alleges the Director failed to observe principles of natural justice in making the Determination.
16. In respect of such allegations, the Tribunal has said, in *Imperial Limousine Service Ltd.*, BC EST #D014/05:

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).

Parties 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).

17. There is no evidence in this case that Primetop was not provided an opportunity to know the claims being made against them and an opportunity to present their position on the claims. Under this ground of appeal, Primetop has made the following submissions, which I shall only summarize:
- The Director failed to consider that MacQuarrie was not the only person who had worked on the deck preparation;
 - Mr. Dela Cruz made an apparently incorrect presumption about a question asked by the Director and the Director has apparently misinterpreted his answer;
 - One of the witnesses who gave evidence about the work he did for Primetop on the job for which MacQuarrie had made his claim had his facts mixed up with another project he worked on; and
 - The Director was convinced MacQuarrie worked on certain days, including December 2, 2006, but new evidence show he did not work on December 2.
18. There are no submissions in the appeal specific to the natural justice ground. All of the submissions relate to findings of fact which Primetop seeks in the appeal to undermine and which entirely relate to the admission of new evidence. I find, therefore, that the Appellant has failed to meet the onus of demonstrating on a balance of probabilities that the Director failed to observe principles of natural justice in making the Determination.
19. In respect of the new evidence that Primetop has sought to submit in this appeal, some preliminary comments concerning this ground of appeal, and new evidence generally, are appropriate.
20. The Tribunal has taken a relatively strict view of what will be accepted as new evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal has discretion to allow new or additional evidence. In addition to considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is 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).
21. As indicated above, the new evidence consists of six photographs, apparently taken on December 2, 2006, showing a person, who Primetop claims is Bill Szabo, working on the deck which MacQuarrie claimed, and the Director accepted, he was working on that day. Primetop has not provided any extensive submission seeking to explain why the Tribunal should not conclude the six pictures were reasonably

available and could have been submitted during the complaint process. They have said only: “We just realized we have pictures to contradict the above hours . . .”.

22. In response to the submission of these photographs as new evidence, the Director says they must have been available at the time the Determination was being made and, in any event, without the evidence of Bill Szabo, the photographs have limited evidentiary value. For his part, MacQuarrie says two things about the photographs. First, he says the person in the photographs is him, not some person named Bill Szabo. Second, he says what the photographs show is not a final install; he says the vinyl was only attached at the wall, “as to be lifted to dry on good days”.
23. In final reply, Primetop has replied to several of the arguments made by the Director and MacQuarrie. Most of these replies do not advance the merits of the appeal at all. A further explanation for the failure to provide the photographs during the complaint process is given. In that response, Primetop says they “don’t contest” that the photos could have been made available earlier, but Primetop didn’t appreciate that the very existence of Bill Szabo was being questioned. Primetop says they made considerable effort to find Mr. Szabo for the June 11 hearing and have, only recently, located Mr. Szabo. Included with the final reply is a copy of a typed letter, dated September 20, 2007 and addressed to the Tribunal, purporting to be from Bill Szabo, which says:
24. This is to confirm that the man in the photos working on the Southdale Project of Primetop Construction, dated December 2, 2006 is me, Bill Szabo (contact number . . .).
- I also confirm that the signed acknowledgement receipt dated December 2, 2006 is authentic and signed by myself on said date. Needless to say, I confirm that I did the vinyl install on Southdale Project, just by myself, and some help from Joel, the owner of Primetop, on December 2, 2006.
- The phone number . . . that Primetop had on record was my old cell phone number and no longer exists, that’s why they were not able to locate me earlier.
25. The final reply, to which this letter was attached, was filed with the Tribunal on September 21, 2007.
26. Primetop has not met the conditions for having the Tribunal accept new evidence. The photographs were available at the time the Determination was made. From the perspective of the Tribunal, the photographs are not particularly credible, since they do not identify the individual in them. The letter purporting to be from Mr. Szabo does not change that perspective of the photos.
27. The grounds of appeal under Section 112 of the *Act* are limited. They do not extend to allowing the Tribunal to consider appeals based on alleged errors in findings of fact unless such findings amount to an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). Primetop has neither alleged an error of law nor shown there was any error of law in respect of the findings of fact made by the Director. The challenged findings were made after an analysis of the evidence presented by the parties during the complaint hearing and are rationally supported by that evidence. Primetop has not shown any of the factual findings and conclusions in the Determination were made without any evidence at all or were perverse and inexplicable. All Primetop has done is to perpetuate a dispute over a particular fact made by the Director without establishing a reviewable error was made.
28. This appeal is dismissed.

ORDER

29. Pursuant to Section 115 of the *Act*, I order the Determination dated March 2, 2007 be confirmed in the total amount of \$1817.29, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal