

An appeal

- by -

607470 B.C. Ltd. carrying on business as Michael Allen Painting  
("Allen Painting")

- 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.:** 2007A/89

**DATE OF DECISION:** October 12, 2007

## DECISION

### OVERVIEW AND FACTS

1. This is an appeal by 607470 B.C. Ltd. carrying on business as Michael Allen Painting (“Allen Painting”) under Section 112 of the *Employment Standards Act* (the “Act”) of a determination of the Director of Employment Standards (the “Director”) issued July 11, 2007 (the “Determination”).
2. Allen Painting operates a painting business within the jurisdiction of the Act. Tyler Hicks (“Hicks”) worked for Allen Painting as a painter from November 16th, 2006 to January 13th, 2007 at the rate of pay of \$15.00 per hour. On or about February 7th, 2007, Hicks filed a complaint under Section 74 of the Act against Allen Painting (the “Complaint”) alleging that Allen Painting contravened the Act by failing to pay him wages.
3. On March 14th, 2007, a delegate of the Director (the “Delegate”) telephoned Allen Painting and notified the sole director and officer of Allen Painting, Mr. Michael Allen (“Allen”), of the Complaint and explained to Allen the relevant provisions of the Act relating to the Complaint.
4. On or about March 16th, 2007, the Delegate forwarded the Complaint document as well as Hicks’ records in support of the Complaint to Allen.
5. On March 23rd and 27th, 2007, the Delegate attempted to contact Allen to discuss the Complaint and left messages on Allen’s voice mail to no avail as Allen did not return the Delegate’s telephone calls.
6. On April 5th, 2007, the Delegate sent, by certified or registered mail, to both Allen Painting and to Allen a Notice of the Complaint Hearing and the Demand for Employer Records. According to the Canada Post Record of Delivery, Allen accepted delivery of the said documents on April 10, 2007.
7. On May 9th, 2007, the Delegate conducted a hearing of the Complaint (the “Hearing”). No one attended at the Hearing on behalf of Allen Painting. Accordingly, all the evidence adduced at the Hearing by Hicks went undisputed. The Delegate, after conducting the Hearing, determined that Allen Painting contravened Sections 17, 40, 45 and 58 of the Act by failing to pay Hicks’ wages in the amount of \$735.00, overtime pay in the amount of \$138.75, statutory holiday pay in the amount of \$93.90, and vacation pay in respect of the wages awarded in the amount of \$36.48. In addition, the Director also awarded Hicks accrued interest of \$25.92 on the aforesaid amounts for a grand total of \$1,030.05.
8. Furthermore, pursuant to section 29(1) of the *Employment Standards Regulations* (the “Regulations”), the Delegate imposed four administrative penalties of \$500.00 each on Allen Painting for contraventions of Sections 17, 40 and 45 of the Act and Section 46 of the Regulations. The latter penalty pertained to Allen Painting’s failure to produce employer records.
9. Allen Painting is appealing the Determination on the sole ground that evidence has become available that was not available at the time the Determination was being made and asking this Tribunal to change or vary the Determination.
10. Allen Painting has not requested an oral hearing of its appeal and this Tribunal is of the view that an oral hearing is not necessary in order to adjudicate the appeal. Therefore, the Tribunal will determine the

appeal based on the review of the Determination, the written submissions of Allen Painting, Hicks, the Director and the Section 112(5) "Record".

## ISSUE

11. The sole issue to be determined 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 changing or varying the Determination in any manner?

## ARGUMENT

### *Allen Painting's Submissions*

12. Allen submitted written submission in support of Allen's Painting's appeal. In his submissions, Allen apologized for Allen Painting's "lack of communication and correspondence" with the Employment Standards Branch ("Branch") presumably referring to Allen Painting's failure to return the Delegate's telephone calls during the investigation of the Complaint; failure to respond to the Demand for Employer Records; and failure to attend at the Hearing of the Complaint. Allen attributes his failure to correspond or communicate with the Branch to his business trip to Victoria as he was leaving for Victoria when he received a registered letter from the Branch. He indicates that he never opened the said registered letter and did not know the contents thereof. He simply put the correspondence in his briefcase and was hopeful that the Branch would send a second piece of correspondence to him. Allen also explained his failure to communicate with the Branch or the Delegate while in Victoria due to certain limitations involving cell phone use in the environment in which he was in, namely, sandblasting large oil tanks in an oil field.
13. With respect to the new evidence ground of appeal, Allen states that Hicks received a \$200.00 cash advance, which is not reflected in any of Hicks' statements or documents. Allen further states that Hicks' recollection of hours worked did not coincide with Hicks' hours worked as documented by Hicks' supervisor. Allen states that Hicks was the only employee whose hours worked did not reconcile with the hours documented for him by his supervisor. Allen also asserts that Hicks consistently neglected to deduct lunch hours in his documented hours of work and Allen had to intervene constantly to correct Hicks' totals for hours worked.

### *Submissions of Hicks*

14. In his written submissions to Allen Painting's appeal, Hicks expresses his outrage at Allen for attacking his integrity and the veracity of his evidence. I will not reiterate particulars of Hicks' submissions on this subject here, as I do not believe that they are relevant, necessary or helpful in my decision-making.
15. On a more relevant note, however, Hicks, in challenging Allen's submission that he was paid a \$200 cash advance, states that included in the documents he submitted to the Branch were some official pay stubs that Allen issued to him and they do not show any monetary advances made to him.
16. Furthermore, Hicks argues, contrary to Allen's assertion, that he never had a supervisor. Instead, Hicks states that the individual Allen is referring to, as his supervisor was a co-worker with whom he discussed the hours he worked and ultimately recorded. Hicks states that the said co-worker quit his employment

with Allen Painting on December 1st, 2006 and thereafter Hicks was the sole employee of Allen Painting which period includes the operative period December 13th to December 21st, 2006, when Hicks was not paid his wages by Allen Painting.

### ***Submissions of the Director***

17. The Director submits that the evidence Allen Painting wishes to submit on appeal is not new evidence and was available at the time of the Hearing but not adduced by Allen Painting at the Hearing because Allen Painting did not attend at the Hearing or respond to the communications from the Branch despite having complete knowledge of the Complaint and Hicks' evidence and notice of the Hearing date. Accordingly, the Director states that Allen Painting fails to satisfy the test for admitting new or fresh evidence upon appeal.

### **ANALYSIS**

18. Allen Painting's appeal is based on the ground that new evidence has become available that was not available at the time the Determination was made. The test this Tribunal is bound by in determining whether or not to accept new evidence or whether evidence qualifies as new evidence for acceptance on an appeal is delineated in *Re: Merilus Technologies Inc.*, B.C. E.S.T. #D171/03. The Tribunal in *Merilus* set out the following four conditions that must be met before new evidence will be considered:

- 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; and
- 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.

19. It should be noted that the four criteria above are a conjunctive requirement and therefore the party requesting the Tribunal to admit new evidence has the onus to satisfy each of them before the Tribunal will admit any new evidence.

20. In the case at hand, I am not satisfied that Allen Painting has met the first criterion in the *Merilus* test. The evidence Allen wishes to adduce on behalf of Allen Painting as new evidence in this appeal is not evidence that 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. In this case, in advance of the Hearing, the Delegate sent, by certified or registered mail, to Allen and Allen Painting a Notice of Complaint Hearing and a Demand for Employer Records. There is evidence in the form of Canada Post's record of delivery indicating that Allen accepted delivery of the said documents on April 10, 2007, well in advance of the Hearing. Allen also acknowledges that he picked up the certified or registered mail from the Delegate, but he was in the process of leaving on a business trip to Victoria, and decided not to open the mail but to simply deposit it in his briefcase in the hopes that the Branch or the Delegate would make another attempt by correspondence to contact him.

21. There is no explanation from Allen as to why he could not have simply made a very brief call to the Delegate upon receiving the certified or registered mail from the Delegate to advise the latter that he wanted an extension of time to deal with the matter as he was embarking on a business trip to Victoria. Allen certainly knew or should have known what the correspondence was about, as he had previously spoken with the Delegate about the Complaint, and therefore Allen's decision not to open the correspondence from the Delegate was an unfortunate choice on his part and one that was prejudicial to his company, Allen Painting. In my view, Allen's decision not to open the correspondence from the delegate and therefore his ultimate failure to comply with the Demand for Employer Records and participate at the Hearing does not qualify the evidence he is now adducing on behalf of Allen Painting as new evidence. New evidence is not new where a party turns a blind eye to telephone calls and correspondence from the Delegate during the investigation stage of a complaint and fails to attend at the Hearing to adduce evidence that was otherwise available to it.
22. Accordingly, I find that Allen Painting has failed the first of the four-fold test in *Merilus, supra*, and it is not necessary for me to review Allen Painting's new evidence in relation to the balance of the *Merilus* test.
23. Having said this, I am also mindful of the purposes of the Act and wish to add that another compelling reason for not allowing Allen Painting to adduce the so called new evidence in the appeal is that it would have the effect of frustrating one of the fundamental purposes of the Act contained in Section 2(d), namely, to provide fair and efficient procedures to resolve disputes.

## **ORDER**

24. Pursuant to Section 115(a) of the Act, I order that the Determination be confirmed as issued together with any further interest that may have accrued, pursuant to Section 88 of the Act, since the date of the issuance of the Determination.
25. I further confirm that the Determination relating to the four administrative penalties of \$500.00 each against Allen Painting.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**