

An appeal

- by -

Edward Allen Magee operating Delta Enterprises  
(“Delta”)

- 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.:** 2005A/74

**DATE OF DECISION:** July 13, 2005

## DECISION

### SUBMISSIONS

Michael J. Kuta, Souch & Company	on behalf of Edward Allen Magee
Hans Suhr	on behalf of the Director of Employment Standards
Moonyean Booth	on her own behalf

### OVERVIEW

1. This is an appeal by Edward Allen Magee operating as Delta Enterprises ("Delta"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued March 24, 2005.
2. Moonyean R. Booth worked for Delta, a bottle recycling depot and used furniture business from April 23, 1995 until May 5, 2004. Although she was primarily employed as a bookkeeper, she also did other odd duties including moving furniture, sorting bottles and moving pallets. Ms. Booth filed a complaint alleging that she was owed regular wages.
3. The Director's delegate investigated Ms. Booth's complaint. The delegate determined that the issues were whether Ms. Booth was a manager, whether she was entitled to wages, and whether she was owed compensation for length of service.
4. The delegate determined that Ms. Booth was not a manager as defined in the Regulations. He found that Delta had contravened sections 35, 40 and 45 of the *Employment Standards Act* in failing to pay Ms. Booth overtime wages and statutory holiday pay. He also concluded that Delta had contravened section 63 of the *Act* in failing to pay Ms. Booth compensation for length of service. Finally, the delegate also determined that Delta had contravened section 18 of the *Act* in failing to pay Ms. Booth all wages owing within 48 hours after Ms. Booth's employment was terminated.
5. The delegate found Ms. Booth was entitled to wages in the total amount of \$5,987.94. The delegate also imposed a \$1,000 penalty on Delta for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulations*.
6. Delta submits that the delegate failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.
7. Although Delta sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties.

## ISSUES

8. 1. Whether the delegate failed to observe the principles of natural justice in making the determination; and
9. 2. Whether new evidence has become available at the time the determination was being made that would have led the Director to a different conclusion on the material issues?

## THE FACTS AND ARGUMENT

10. The facts relevant to this appeal are as follows.
11. Ms. Booth's allegations were set out in a Complaint and Information Form dated July 12, 2004. In it, Ms. Booth claimed both regular wages and overtime wages between December 4, 2003 and May 5, 2004. The form does not indicate that Ms. Booth claimed statutory holiday pay or compensation for length of service.
12. Ms. Booth advised the delegate that she often did her bookkeeping tasks at home because she had too many other duties to do the books at work, and she had no computer at the office. She said that she did the books on her own computer and would forward the computer spreadsheets to the employer's accountant in Kelowna. Ms. Booth provided the delegate with records for those hours of work she performed from home.
13. On October 26, 2004, the delegate issued a Demand for payroll records, specifically all records relating to wages, hours of work and conditions of employment, as well as "any and all documents relating to the termination of Moonyean (Mimi) Booth, including any and all documents that the employer relies on to establish just cause to terminate the employee, as well as a copy of the Record of Employment".
14. In a January 25, 2005 letter to Mr. Magee, the delegate indicated that Ms. Booth had filed a complaint alleging that she was owed regular wages, overtime wages, deductions from wages and "compensation for length of service (sometimes called termination or severance pay)". The letter requested that Mr. Magee forward any evidence he might have disputing the allegations.
15. Mr. Magee's response was set out in a letter faxed to the delegate on February 11, 2005. Mr. Magee wrote that he disputed all Ms. Booth's allegations. He enclosed payroll statements from January 2, 2004 to May 7, 2004 which had been prepared by Ms. Booth. Mr. Magee indicated that these records "confirm[ed her] hours worked and payment". He stated that "prior to [Ms. Booth's] resignation on May 5, 2004, all staff wages were paid up in accordance to the payroll records prepared by Moonyean Booth. At no time was there any indication that any regular or overtime wages were outstanding to employees" [reproduced as written] The letter did not contain any response to Ms. Booth's allegation that she was entitled to compensation for length of service.
16. It is apparent from the Determination that the delegate had at least one telephone conversation with Mr. Magee. In the Determination, the delegate wrote "During the telephone conversations the employer stated...". The delegate did not disclose, as part of the record, any notes he might have taken about the content of those conversations.

17. The Determination indicates that Mr. Magee told the delegate he was aware Ms. Booth was taking books home and that he told her several times not to do so. He said there was no need for Ms. Booth to take the books home as she could have done the work at the work site. Furthermore, he said that Ms. Booth ought to have paid herself if she performed extra work at home, and she never did so.
18. The delegate concluded that, because Mr. Magee took no action with respect to Ms. Booth's alleged failure or refusal to follow his instructions not to take work home, Ms. Booth was entitled to wages for that work. The delegate relied on Ms. Booth's records for the last six months of her employment, and determined that she was entitled to 59.5 hours of straight time work and 39.5 hours of overtime work.
19. Ms. Booth advised the delegate that she had been fired after she complained about sorting a bag of bottles that contained dog feces.
20. The Determination notes that Mr. Magee told the delegate that he was contemplating firing Ms. Booth following a disagreement, but Ms. Booth and two other employees approached him and told him they were quitting, and that Ms. Booth handed over her keys to the business.
21. The delegate determined that Mr. Magee had the burden of establishing that Ms. Booth quit in order to relieve him of the obligation to pay her compensation for length of service. The delegate found no evidence supporting Mr. Magee's assertion, and noted that, in the Record of Employment ("ROE"), instead of inserting the code for "quit", the employer put the code for "other", adding the comment "unreconcilable(sic) differences". The delegate concluded that Ms. Booth's employment had been terminated without written notice or just cause.
22. Counsel for Mr. Magee submits that the delegate did not fully reveal to Mr. Magee the allegations Ms. Booth made regarding her position that she was fired, or her claims for unpaid work and statutory holiday and vacation pay, and as a result, Mr. Magee could not properly provide the delegate with evidence rebutting those allegations.
23. Counsel submits that the delegate did not disclose to Mr. Magee that Ms. Booth claimed she forwarded computer spread sheets to Mr. Magee's accountant in Kelowna. Consequently, he says that Mr. Magee was not able to forward information rebutting that assertion from his accountant, Mr. Walls. Counsel submits that he has evidence from Mr. Walls indicating that Ms. Booth never sent him any spread sheets; rather, she sent handwritten reports that contained information that was available at the office and did not require work on a computer (such as inventory counts).
24. Counsel for Mr. Magee also contends that the delegate gave considerable weight to the ROE which had actually been prepared by Ms. Booth. He submits that Mr. Magee simply signed the ROE without appreciating the significance of the code. The delegate submits that, whether or not Mr. Magee prepared the document, he signed it, acknowledging the contents to be true and that it was an offence to make false entries.
25. The delegate also found that Ms. Booth was entitled to statutory holiday pay. Mr. Magee's counsel submits that Mr. Magee was never told this was an issue, and never given the opportunity to prove that Ms. Booth was paid for these days. Attached to the appeal submission are copies of cheques made out to Ms. Booth allegedly for those days. The delegate says that the Director is obligated to apply the provisions of the Act, and that payment of statutory holiday pay was a consequence of finding Ms. Booth entitled to wages for work performed at home.

26. The delegate submits that the “new evidence” provided by Mr. Magee on appeal was available during the investigation, and that he has not provided any reasonable explanation why it was not provided at that time. The delegate also submits that Mr. Magee had been requested on two occasions in writing, and in telephone conversation, to provide any and all information he wished the delegate to rely on. He submits that the Determination should not be overturned as a result of Mr. Magee’s choice to not fully participate in the investigation.

## **ANALYSIS AND DECISION**

27. 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;  
or
  - (c) evidence has become available that was not available at the time the determination was being made

### ***Natural Justice***

28. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker.
29. Parties alleging a denial of a fair hearing must provide some evidence in support of that allegation. (see *Dusty Investments Inc. dba Honda North* BC EST #D043/99)
30. Counsel for Mr. Magee relies on the Tribunal’s decision in *J.C. Creations Ltd. o/a Heavenly Bodies Sport* (BC EST #RD317/03) which found that the delegate had not meaningfully heard the Employer’s side of the story, thereby making fundamental factual errors.
31. Counsel submits that Ms. Booth’s allegations were accepted without question by the delegate without Mr. Magee being given the opportunity to challenge or refute them. He submits that an oral hearing be held to determine the credibility of the parties.
32. Section 77 provides that, if an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond. Section 77 is in keeping with the objectives of the *Act*, one of which is to provide for fair and efficient procedures for resolving disputes. (section 2, see also *Insulpro* BC EST #D405/98)
33. I conclude that Mr. Magee had every opportunity to respond to Ms. Booth’s allegations, in compliance with both section 77 of the *Act* and the principles of natural justice.
34. Mr. Magee was given full disclosure of the allegations against him, including Ms. Booth’s allegation that she was fired. Those allegations were set out in two letters from the delegate, and at least one telephone call. The letters set out the issues before the delegate, and ask Mr. Magee to produce payroll records.

35. I also find that Mr. Magee had full opportunity to respond to those allegations. The letters are dated almost two months apart and give Mr. Magee time to provide documentation in support of his position.
36. Mr. Magee's response consisted of a blanket denial of Ms. Booth's allegations, the provision of some payroll records and a copy of Ms. Booth's ROE.
37. The Determination also discloses that, unlike the appellant in *Heavenly Bodies*, Mr. Magee also had at least one telephone conversation with the delegate during which he verbally responded to Ms. Booth's allegation that she had been fired.
38. As I noted above, parties alleging a denial of natural justice hearing must provide some evidence in support of that allegation. Mr. Magee does not say what was or was not disclosed to him during the telephone conversations apart from alleging that the delegate "did not fully reveal the allegations [Ms. Booth] was making to support her contention that she was fired". Even if all of the details of Ms. Booth's allegation had not been disclosed, the fact is that Mr. Magee had the burden of satisfying the delegate that Ms. Booth had quit her employment. There is no evidence Mr. Magee provided the delegate with anything other than the ROE and his unsubstantiated assertions that Ms. Booth quit. The delegate determined that the ROE supported Ms. Booth's complaint. Mr. Magee cannot now succeed in his appeal by suggesting that he did not prepare the ROE and that he was unaware of the import of that document.
39. Mr. Magee attempts to submit, as new evidence, a number of documents which he says support his position. I have not considered this new evidence, as it clearly was available during the course of the investigation, and ought to have been presented to support Mr. Magee's position at that time.
40. Similarly, I find that the delegate disclosed to Mr. Magee that Ms. Booth had complained about unpaid wages and vacation pay. Mr. Magee had been served with a Demand for payroll records. Mr. Magee was to provide the delegate with all records he was required to keep under section 28 of the *Act*. Those records would disclose whether the *Act* had been complied with, including the payment of statutory holiday pay.
41. I find no basis for this ground of appeal.

### ***New Evidence***

42. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.* (BC EST #D 171/03) the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- 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.

43. I find that the “new” evidence, which consists of copies of paycheques and monthly reports showing wages paid for various pay periods, examples of shift inventory sheets, a letter from Mr. Magee’s accountant and a letter from another Delta employee, was available during the investigation, and ought to have been presented to the delegate.
44. This ground of appeal can only succeed in this instance if Mr. Magee was denied natural justice in the sense that he was not given full opportunity to know the case he had to meet, and given full opportunity to do so. As I have concluded that the delegate had fully disclosed all of the issues, and given Mr. Magee opportunity to respond to them both in writing and by telephone, there is no basis for allowing new evidence.
45. The Tribunal will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process. In *Tri-West Tractor Ltd.* (BC EST #D268/96), the Tribunal held that it would not allow appellants to “sit in the weeds”, failing or refusing to cooperate with the delegate during an investigation and then later file appeal of the Determination when they disagreed with it.
46. I deny the appeal on this ground.

## **ORDER**

47. I Order, pursuant to Section 115 of the Act, that the Determination, dated March 24, 2005, be confirmed, together with whatever interest may have accrued since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**