

An appeal

- by -

692886 Alberta Ltd. o/a Shannon Motel

- 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: Robert Groves

FILE No.: 2007A/81

DATE OF DECISION: October 16, 2007

DECISION

OVERVIEW

1. This is an appeal brought by 692886 Alberta Ltd. o/a Shannon Motel from a determination dated July 16, 2007 (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") which found that an entity identified as "Shannon Motel Ltd." had contravened sections 21, 28, 40, 46 and 58 of the *Employment Standards Act* (the "Act") in respect of complaints filed by Christine Kenmuir and Doug Kenmuir. The Delegate found that the Kenmuirs were entitled to wages and interest in the amount of \$3,200.74. The Delegate also imposed four administrative penalties of \$500.00 each against Shannon Motel Ltd. pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*. The total found to be owed was therefore \$5,200.74.
2. As I have indicated, the Determination was issued against an entity described as "Shannon Motel Ltd." The appeal has been brought in the name of "692886 Alberta Ltd. o/a Shannon Motel". The voluminous record supplied to the Tribunal by the Delegate appears to contain no corporate searches for either Shannon Motel Ltd. or 692886 Alberta Ltd. I do observe that the record contains copies of employment agreements involving the Kenmuirs which name Shannon Motel Ltd. as the employer. On the other hand, the Kenmuirs' original complaint forms appear to identify the numbered company as their correct employer, as do the Records of Employment issued to them after their employment had ceased. The correspondence generated during the Delegate's investigation which was directed to the Delegate from a Kevin Heo, identified as a representative of the Kenmuirs' employer for the period in respect of which the complaints had been launched, states clearly that it was being written on behalf of "692886 Alberta Ltd. o/a Shannon Motel".
3. The numbered company has appealed the Determination on all of the grounds identified in section 112 of the *Act*, that is a) the Delegate erred in law, b) the Delegate failed to observe the principles of natural justice in making the Determination, and c) evidence has become available that was not available at the time the Determination was being made. I observe, however, that none of the very lengthy and detailed submissions filed on behalf of the numbered company in particular, but also by the other parties on this appeal, addresses the issue whether Shannon Motel Ltd. is properly described as the Kenmuirs' employer, and therefore the party that can be said to have contravened the *Act* in the manner set out in the Determination.
4. I also note from the correspondence in the Tribunal's file that the Director received a certified cheque on August 22, 2007 from Mr. Heo in the amount of \$5,200.74, representing the total sum found to be owed to the Kenmuirs in the Determination. Following that payment, the Tribunal informed the parties and the Director that the Determination was suspended pursuant to section 113 of the *Act*, and ordered that the funds so paid be held in trust pending the disposition of the appeal on its merits.
5. In my opinion, the Determination is tainted in that it does not appear to me that it adequately addresses the question whether Shannon Motel Ltd., 692886 Alberta Ltd. o/a Shannon Motel, or indeed some other legal person, is the party that should be found to have violated the *Act* with respect to the complaints filed by the Kenmuirs. Having reviewed the record and submissions provided to me on this appeal, it seems to me that the Delegate may merely have *assumed* that an entity called Shannon Motel Ltd. was the proper subject of the Determination. Several other documents in the record, the Appeal Form, and the submissions on behalf of the numbered company all suggest, however, that it was the numbered company

that was the Kenmuirs' employer at all relevant times. The difficulty this creates is compounded by the fact that there is nothing in the Determination, or the Reasons for the Determination, which reveals the investigative steps the Delegate took in order to satisfy herself that Shannon Motel Ltd. was the legal entity that should be found liable in respect of the Kenmuirs' complaints. I cannot conclude, therefore, that the Determination correctly identifies Shannon Motel Ltd. as the party that has contravened the *Act* in this instance. Indeed, it is not apparent to me that Shannon Motel Ltd. even exists, as a legal person.

6. The failure which presents itself in this case, then, is a failure on the part of the Delegate to provide adequate reasons for her conclusion concerning the identity of the Kenmuirs' employer for the purposes of enforcing the relevant provisions of the *Act*. Several previous decisions of the Tribunal have stated that a failure to give adequate reasons may be characterized as an error of law, or as a failure to observe the principles of natural justice (see, for example: *Chamberlin o/a Super Save Gas* BC EST #D374/97; *Walter E. Johnson* BC EST #D122/04). On either basis, the Determination cannot, in my view, be permitted to stand.

7. The remedial power of the Tribunal is set out in section 115 of the *Act*, which reads:

115.(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

(a) confirm, vary or cancel the determination under appeal, or

(b) refer the matter back to the director.

8. In circumstances such as these, I take guidance from what was said by Member Lawson in *Hub-City Boat Yard Ltd.* BC EST #D027/04, as follows:

The legislature empowered the Tribunal to refer a matter back to the Director in cases where the Determination under appeal could not properly be confirmed, varied or cancelled, and where a reinvestigation or reconsideration is required, with directions (see *Re Zhang* BC EST #D130/01). The Tribunal's decision will normally identify the errors made in the Determination, and the referral back is normally an opportunity for the Director to remedy those errors and arrive at a correct Determination. A practice has arisen, however, in which the Director makes a report back to the Tribunal instead of a new Determination, and in that report, the Director outlines the results of its reinvestigation or reconsideration. This practice renders the process more efficient, as the Tribunal is placed in a position to confirm, vary or cancel the Determination with the benefit of the Director's reinvestigation and reconsideration, but without the delay and expense involved with the making of a new Determination (with a new right of appeal).

9. As all parties have delivered submissions on this appeal which relate to issues unconnected with the proper identity of the employer who should be the subject of the Determination, I prefer to refer that sole question back to the Director for reinvestigation and reconsideration. The Director shall be at liberty to report back to the Tribunal, rather than issue a new determination, should the Director deem it appropriate once the process of reinvestigation and reconsideration is concluded.

ORDER

10. Pursuant to section 115(1)(b) of the *Act*, I order that the Kenmuirs' complaints be referred back to the Director for reinvestigation and reconsideration of the question whether Shannon Motel Ltd. is properly identified as the legal person responsible for the contraventions of the *Act* set out in the Determination dated July 16, 2007.

Robert Groves
Member
Employment Standards Tribunal