

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/75

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
Angela 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. Angela Booth worked as a cashier/bookkeeper for Delta, a bottle recycling depot and used furniture business from July 31, 2001 until May 5, 2004. Ms. Booth filed a complaint alleging that she was owed wages.
3. The Director’s delegate investigated Ms. Booth’s complaint. At issue before the delegate was whether Ms. Booth was entitled to wages and statutory holiday pay.
4. The delegate found that Delta had not paid Ms. Booth all wages she was entitled to. He determined that Delta had contravened section 45 of the *Employment Standards Act* in failing to pay Ms. Booth statutory holiday pay. He further 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 \$701.93. 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 regular wages, statutory holiday pay and vacation pay between December 5, 2003 and May 5, 2004.
12. Ms. Booth advised the delegate that she worked part time for the employer at the bottle depot, and assisted with the books at home in the evening. She contended that Mr. Magee knew she was helping with the books at home, and that she was never paid for that work. Ms. Booth provided the delegate with records for those hours of work, which amounted to 67.5 hours.
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 specified in section 28 of the *Act*.
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 wages and vacation pay, and advising him that, if he disputed the allegations, he was to provide his reasons in writing along with a copy of his payroll records and any other supporting documentation.
15. By way of a letter faxed to the delegate on February 11, 2005, Mr. Magee disputed all Ms. Booth's allegations. He submitted that Ms. Booth's mother, who was employed as Delta's bookkeeper, prepared all payroll records, including maintaining time slips. He stated that all staff wages had been paid up to May 5, 2004, in accordance with those records. Mr. Magee forwarded a copy of the payroll statement from January 2, 2004 to May 7, 2004 to the delegate, as well as the Record of Employment. The ROE, which was signed by Mr. Magee, indicated that Ms. Booth was a cashier/bookkeeper.
16. In a telephone conversation with the delegate on March 14, 2005, Mr. Magee stated that he was aware that work was being done on the books at Ms. Booth's home, and he had told Ms. Booth's mother, Moonyean Booth, not to do that work.
17. The delegate concluded that, because Mr. Magee took no action with respect to Moonyean 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 67.5 hours of straight time work, for a total amount of \$573.75.
18. The delegate also found that Ms. Booth had not been paid any statutory holiday pay during her employment, and concluded that she was entitled to \$101.18 in this respect.
19. Counsel for Mr. Magee submits that Mr. Magee had no knowledge that Ms. Booth was assisting with the books, either at home or at work. Counsel submits that, although Mr. Magee was aware Moonyean Booth claimed she did bookkeeping tasks at home, Ms. Booth was hired only as a part time cashier and he could not have known Ms. Booth was assisting her mother in this work. He further submits that there were no "books" to be kept, only simple inventory sheets which the cashier on duty filled out at the end of each shift.

20. Counsel submitted that the ROE was signed by Mr. Magee at an “emotionally-charged moment” after Ms. Booth and her mother announced they were quitting, and he “simply signed the form as requested”.
21. Delta’s counsel further submits that the delegate erred in imposing a “fine” since the amounts owing were so small, there is no evidence of problems with any other employees, and Mr. Magee paid what he thought he owed in “good faith” at the time.
22. Ms. Booth contends that Mr. Magee was fully aware she was doing spreadsheets on the computer at home since he complained about her mother’s handwriting, saying he could not read it. She also says that, at Mr. Magee’s request, she started doing weekly inventory spreadsheets, which were shown to him on a regular basis. She says she told Mr. Magee she would be happy to do the data entry at the depot if there was a computer available to her there. She also says that Mr. Magee asked her to make changes to certain documents which he was aware she could not do without a computer.
23. Ms. Booth contends that Mr. Magee signed the ROE’s after reviewing them himself, and having his accountant review them.
24. The delegate submits that Mr. Magee signed the ROE’s knowing that it was an offence to make false entries, and by signing certified that the statements on the form were true.
25. The delegate submits that Mr. Magee had full knowledge of the issues in dispute, and had every opportunity to respond to them.

ANALYSIS AND DECISION

26. 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

27. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker.
28. 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)
29. 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.

30. 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)
31. 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.
32. Mr. Magee was given full disclosure of the allegations against him. Those allegations were set out in two letters and a telephone call with the delegate. Mr. Magee's response consisted of a blanket denial of the allegations, and the submission of payroll records and the ROE.
33. Mr. Magee submitted certain documents in response to those allegations and, unlike the appellant in *Heavenly Bodies*, had at least one telephone conversation with the delegate.
34. As I noted above, parties alleging a denial of natural justice hearing must provide some evidence in support of that allegation. .
35. The ROE, which Mr. Magee signed, supported Ms. Booth's assertion that she worked as a bookkeeper. Mr. Magee cannot now succeed in his appeal by suggesting that he did not prepare the document and was unaware of the import of that document.
36. Similarly, I find that the delegate did disclose 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 in respect of statutory holiday pay.
37. I find no basis for this ground of appeal.

New Evidence

38. 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.
39. 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.

40. 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.
41. 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.
42. I deny the appeal on this ground.

Error of Law

43. Counsel for the employer also objects to the imposition of the administrative penalty, which he characterizes as a “fine”. Although no ground of appeal is identified for this objection, I infer counsel suggests it is an error of law, and I have considered it on this basis.
44. Section 29(1) of the *Employment Standards Regulations, B.C. Reg 396/95* sets out a schedule of monetary penalties for “a person who contravenes a provision of the *Act* or this regulation, as found by the director in a determination made under the *Act* or this regulation”.
45. The section provides for escalating penalties for subsequent contraventions:
- (a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3 year period preceding the contravention, a fine of \$500;
 - (b) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under that paragraph occurred, a fine of \$2 500;
 - (c) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under paragraph (b) occurred, a fine of \$10 000.
46. Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are not “fines” and are imposed on the finding of a contravention. Having upheld the Determination, there is no basis for cancelling the penalty assessment. (see *Brothers’s Restaurant* (BC EST #D160/04) and *Kopchuk* (BC EST #D049/05))

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.

Carol L. Roberts
Member
Employment Standards Tribunal