

An appeal

- by -

C & W Salvage Ltd  
(“CW”)

- 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 C.P. Walker

**FILE No.:** 2012A/84

**DATE OF DECISION:** October 4, 2012

## DECISION

### SUBMISSIONS

Michele Whiting	on behalf of CW
Barry Dubbin	the Respondent
Victor Lee	on behalf of the Director

### INTRODUCTION:

1. C & W Salvage Ltd. (“CW”) appeals pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination of the Director of Employment Standards issued June 13, 2012, together with accompanying Reasons for Determination of the same date. The Determination requires CW to pay the Respondent the sum of \$3,408.47 for regular wages, overtime wages, statutory holiday pay, and annual vacation pay, and accrued interest. The bulk of the wages consisted of overtime wages calculated at \$2,463.60. It also imposes first time mandatory administrative penalties for CW’s breaches of sections 18 and 46 of the *Act* totalling \$1,000.
2. CW’s Appeal Form dated July 23, 2012, states that its ground of appeal is the Director failed to observe the principles of natural justice in making the Determination. It seeks to cancel the Determination. Its submissions state that the statements of the Respondent made against CW to the Delegate are false. Hence the credibility of the Respondent is a key issue. Further, CW’s rights were denied because they were denied an oral hearing (and therefore were dealt with unfairly) by the Delegate. Similar issues were raised by CW’s counsel before the Delegate prior to a final Determination being made. CW is not represented by legal counsel at this stage.
3. CW advises it would be prepared to attend a hearing with all parties involved. It is not clear whether it expects the Tribunal to hold an oral hearing or whether, if this matter is returned to the Director, it wants an oral hearing at that level.
4. Each of the parties has made written submissions on the Appeal. Section 36 of the *Administrative Tribunals Act* which is incorporated into the *Act* and the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic, and oral hearings.
5. The issue of credibility is an important aspect to this appeal. I have determined that my deliberations will be decided based upon the written submissions of the parties, the section 112(5) record and the Reasons for the Determination. I have determined that if I find in favour of the Appellant the appropriate remedy in such circumstances would be to send the matter back to a delegate for rehearing.

### BACKGROUND

6. The Respondent commenced employment as a 3 month probationary employee with CW on June 2, 2010, as senior accountant. He commuted via bus and ferry from New Westminster to Gibsons, BC, to perform his duties. The Respondent voluntarily quit on August 12, 2010. The commute time was approximately 3 hours each way. During the ferry commute the Respondent worked from time to time on company business. After a couple of weeks the Respondent did not attend Gibsons on Fridays; working instead at home. His

predecessor had a similar arrangement with the employer. The employer denies such an arrangement was sanctioned for the Appellant.

7. During his employment the Respondent received regular pay based on an annual salary of \$45,000 per year for a 40 hour 5 day work week. The Respondent advises that he was instructed to work longer hours to catch up on accounting work for the employer and he did so during the commute, at nights and weekends; and on a statutory holiday. The employer denies authorizing the overtime work. The Respondent also worked from home on August 11 but was not paid for that work as the employer did not believe he worked on that day.
8. By August 10 the employment relationship had deteriorated to the extent that the Respondent decided to accept a position with another employer and gave notice on August 12 that it was his last day working with the employer.
9. In November the Respondent sent a request to the employer for payment for the balance of his regular wages, overtime wages, statutory holiday pay, and vacation pay. Appended to the request were supporting documents including copies of 3 calendar months of June through August where the Respondent had recorded his daily work hours to support the payment request. This was the first time the employer was aware that the Respondent had further monetary claims; particularly in relation to overtime work and statutory holiday pay.
10. No payments were forthcoming so a formal complaint was lodged with the Employment Standards Branch. Delegate Glen Smale was assigned the file and commenced communications with the parties. At this time CW did not have counsel. This included a registered letter to the employer dated May 4, 2011, advising, in part, that the delegate intended to assist the parties in reaching a voluntary settlement but if that cannot occur in a timely manner then the delegate will write a formal decision (a Determination) on the matter. It also included the sentences "Please remember that I am not the complainant's advocate but a neutral party representing the Director of Employment Standards. Accordingly, I wish to hear your response to these allegations."
11. The Director also made a formal Demand for Employer Records from CW. On May 14, 2011, the employer sent its submission on numerous issues to the delegate but declined to forward payroll records of the Respondent.
12. On June 17, 2011, the delegate forwarded a preliminary decision on all issues to the parties. Shortly after, he received an email from a lawyer who advised she had been retained by the employer.
13. In the Reasons for the Determination the delegate states at page R8 :

Therefore, at this juncture, the employer was made aware of the procedure to be used, a procedure that provided them with the opportunity to know the case against them and one that allowed them to present their evidence to a neutral party. As C& W was represented by counsel, both she and the Delegate exchanged information, evidence and arguments throughout the months of July and August 2011. As part of that exchange, in an August 11, 2011 email to counsel, the Delegate enquired as to whether the employer would be prepared to enter into a voluntary settlement process by offering a without prejudice offer by August 17, 2011. If not, then the Delegate sought a written submission by August 24, 2011 so that a Determination could be written.

14. The Reasons for Determination continue:

Following August 15, 2011, the Delegate was contacted by counsel with instructions to seek a face to face meeting with all parties in attendance. The Delegate met with his Manager during the following week and an administrative decision was made to continue with the investigative process and not move to a complaint hearing. On September 2, 2011 the Delegate e-mailed counsel stating in part that he was prepared to recommend that Mr. Dubbin attend a fact-finding session for the same purpose of resolving the differences between the parties. Counsel responded that same day and was unclear what was meant by a settlement offer and expected a full hearing to be held with a Determination being written following the hearing. The Delegate contacted Mr. Dubbin that same day and explained the situation to him. He said that he didn't believe a meeting would assist the process or lead to a resolution and therefore given these events the Delegate informed counsel that a Determination would be written and a request was made for a final submission from the employer. The Delegate telephoned counsel on or about September 2, 2011 and explained why we couldn't move to a hearing-based meeting that was requested by her client and as a settlement offer was not expected, a fact-finding/mediation session would serve no purpose."

15. Counsel for CW prepared an extensive submission and highlighted a number of areas where the credibility of the Respondent was at issue because of her client's positions and evidence. Counsel again sought an oral hearing as the appropriate way to deal with the credibility issues.

16. The Reasons for Determination issued approximately 10 months later contain 31 pages of the delegate's comments, explanations and analyses of the evidence considered by the Delegate and his findings in the case. It is clear that on almost every important issue there was an aspect concerning the credibility of some evidence relied upon by the delegate. This included evidence of third party witnesses.

## ANALYSIS

17. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. It provides:

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

## NATURAL JUSTICE

18. In cases where credibility of the parties is of particular significance the Tribunal has limited authority to review. That is because credibility of witnesses and evidence is a matter best left for the delegate who has heard or reviewed the evidence and observed the parties and any witnesses. Usually, the delegate's analysis and reasons for preferring evidence of one party over another is one which must be carried out diligently and carefully. The reasoning must be legally sound and adequate. *Volzhenin v Haile*[2007 BCJ No. 1209, 2007 BCCA 317]; *ARA Development Ltd.*, BC EST # D012/08.

19. In this case there was direct conflict of evidence of the parties on numerous key issues. The decisions on credibility by the delegate are central to the key issues. CW counsel's submissions regarding credibility

suggested that the delegate hold an oral hearing; but it appears that the delegate, after consultation with his manager, decided to continue with the investigative approach. The Director did not make specific submissions on this appeal regarding why declining an oral hearing was appropriate in these circumstances; or why the investigative process was preferred.

20. A leading decision on determining credibility of witnesses is *Faryna v. Chorney*, [1952] 2 DLR 354 (BCCA). At pages 356-7 the court stated:

The real truth of the story of a witness...must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

21. In *ARA Development Ltd.*, BC EST # D012/08, the Tribunal stated, at paragraph 37:

There are other factors which should be weighed in assessing the credibility of a party or witness: their motives, their powers of observation, their relationship to the parties, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses' evidence. Furthermore, not only must the credibility of the witness be assessed, but the reliability of the evidence must also be analyzed. In other words, the oral evidence of the parties must be tested in light of all the other evidence.

22. In *Enviro Surface Care Ltd.*, BC EST # D037/10, the Tribunal considered whether an oral hearing might be preferable in cases where credibility was an important issue. The Tribunal stated:

A party is not absolutely entitled to an oral hearing before the Director or his delegate although the *Act* does envision such a process (see, e.g., section 84.1). Whether or not Enviro preferred to have an oral hearing is not the issue before me; rather, I must decide whether the delegate's decision to refuse to allow the complaint to proceed to an oral hearing amounted, in this case, to a breach of the rules of natural justice. Enviro's legal counsel repeatedly asked for an oral hearing and was, each time, rebuffed. The delegate now says that an oral hearing was unnecessary but does not specifically state why an investigative procedure was preferable to an oral hearing. The delegate appears to acknowledge there is a credibility issue but says that it was "appropriately addressed in the Determination".

23. In *Enviro, supra*, the Tribunal compared the approach the delegate would take in using submissions to question a party without a counsel's opportunity to ask follow-up questions; and, quite likely, with no opportunity for the delegate to assess a party's demeanor. This was because the questions would not be asked in a face to face forum. The Tribunal determined that approach falls well short of being an adequate substitute for cross-examination in an oral hearing.

24. In this matter CW raised a number of serious credibility issues including the veracity of the hourly calendar record submitted by the Respondent (the original document was not produced); the right of him to work overtime or from home, and where; and whether he was working on August 11, 2010. The overtime claim alone amounts to roughly a 20% increase in his salary during his probationary period. These issues are central to the findings in the Determination.

25. In the circumstances of this case I am satisfied that the failure to hold an oral hearing was a breach of natural justice to the employer. It is clear from the many pages of review of the evidence by the delegate that he was dealing with numerous credibility issues. No reasons are specified as to why the investigative process was deemed the best process. It also appears that the delegate deferred to his manager and the Respondent when making the decision. In my opinion an oral hearing would allow the delegate to hear and assess all witnesses; during examination and cross examination.

26. The delegate has already made numerous credibility findings as outlined in the Reasons for the Determination. It would not be appropriate for that delegate to hold an oral complaint hearing in this matter.

**ORDER**

27. I Order that the matters of the Respondent's entitlements, if any, be referred back to the Director for an oral hearing before a different delegate.

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**Robert C.P. Walker**  
**Member**  
**Employment Standards Tribunal**