Employment Standards TRIBUNAL

An appeal

- by -

John Jurinak operating as Triple J Investments
(the "Employer")

- 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: Yuki Matsuno

FILE No.: 2006A/90

DATE OF DECISION: October 12, 2006

DECISION

SUBMISSIONS

John Jurinak	for the Employer
Mary Walsh	for the Director of Employment Standards

OVERVIEW

1. John Jurinak, operating as Triple J Investments, appeals a Determination of the Director of Employment Standards (the "Director") issued June 9, 2006 (the "Determination"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

2. In the Determination, a delegate of the Director (the "Delegate") found that the Employer had contravened sections 17, 21, and 46 of the *Act* and sections 35 and 46 of the *Employment Standards Regulation* (the "*Regulation*") with respect to the employment of Ted Manolescu. The Employer was ordered to pay Mr. Manolescu the amount of $630.91, inclusive of concomitant vacation pay and interest calculated under section 88 of the *Act*.

3. The Delegate also imposed several administrative penalties on the Employer for contraventions of sections 17, 21, and 46 of the *Act* and sections 35 and 46 of the *Regulation*. The administrative penalties total $2500.00. The total amount of the Determination is $3130.91.

4. The Employer appeals the Determination on the grounds that the Delegate erred in law; that the Delegate failed to observe the principles of natural justice; and that there was new evidence that was not available at the time the Determination was made. He disputes the order to make payments to Mr. Manolescu and all administrative penalties except that imposed for the breach of section 46 of the *Regulation.*

5. Although the Employer seeks an oral hearing, the Tribunal has reviewed the appeal and the accompanying materials and has decided an oral hearing is not necessary in order to decide this appeal.

6. The Employer also requests a suspension of the Determination. Since the Director has received the full amount of the Determination and will hold it in trust pending the outcome of the appeal, no order respecting this issue is necessary.

ISSUES

1. Did the Delegate err in law in making the Determination?

2. Did the Delegate fail to observe the principles of natural justice in making the Determination?

3. Should the appeal be allowed on the basis that there is new and relevant evidence which was not available at the time of the Determination?

BACKGROUND

7. The Employer operates a property management business and employed Mr. Manolescu as a Building Manager from March 1, 2005 to July 29, 2005. On December 28, 2005, Mr. Manolescu filed a complaint with the Employment Standards Branch seeking payment from the Employer on a number of grounds. Various attempts at settlement were made, including mediation, but no settlement resulted. An oral hearing was held by the Delegate at which Mr. Manolescu and the Employer testified. The Delegate issued the Determination on June 9, 2006.

8. The Delegate found that the Employer had contravened the *Act* and the *Regulation* in several ways. The Delegate found that contrary to section 21(2) of the *Act*, the Employer had Mr. Manolescu pay his business costs by requiring Mr. Manolescu to pay for a temporary building manager during several weekend absences.

9. The Delegate also found that the Employer's withholdings of Mr. Manolescu's wages constituted a breach of section 21(1) of the *Act*. The Employer withheld two days worth of wages from his final paycheque, arguing that he was entitled to do so because Mr. Manolescu was paid on a monthly basis, and ceased his employment two days before the end of the month. The Delegate found that this withholding was not justified. The Employer withheld an additional $100.00 because Mr. Manolescu allegedly failed to cut the lawn and the Delegate found that the Employer was not permitted to penalize the employee and/or recoup its business costs in this manner. In addition to requiring the employee be paid the withheld wages, the Delegate also assessed an administrative penalty for breach of section 21.

10. The Delegate also found that the Employer breached section 46 of the *Act* by not paying Mr. Manolescu for work done on two statutory holidays, May 23, 2005 and July 1, 2005. The Delegate ordered statutory holiday pay to be paid to Mr. Manolescu and assessed an administrative penalty on the Employer.

11. The Delegate assessed additional administrative penalties for breach of (a) section 17 of the *Act* (requirement of semimonthly payment of wages); (b) section 35 of the *Regulation* (requirement of employer of resident caretaker to display a schedule specifying the caretaker's hours of work and days off work); and (c) section 46 of the *Regulation* (requirement to produce or deliver records to the Director). The Employer does not dispute the last penalty.

ARGUMENT AND ANALYSIS

12. Section 112(1) of the *Act* outlines the grounds on which a person may appeal a determination:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

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

13. The Employer appeals on all three grounds. The burden is on the appellant Employer to establish the basis of his appeal.

14. Most of the Employer's submissions express disagreement with the Delegate's factual findings in the Determination, and in effect invite the Tribunal to find errors of fact. I note that to do so would be beyond the jurisdiction of the Tribunal and that an appeal is not an opportunity to have the case re-heard on the merits.

1. Did the Director's delegate err in law in the Determination?

15. The Tribunal has established jurisprudence on how to determine whether an error in law has been made. In *Britco Structures Ltd*., BC EST #D260/03, the Tribunal noted that panels have used the following definition of "error of law", set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12 – Coquitlam), [1988] B.CJ. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act*;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle (or, as the Tribunal expressed it in *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05, exercising discretion in a fashion that is wrong in principle).

16. In his submissions, the Employer specifically says that the Delegate committed an error of law in making the Determination with respect to section 21(1) as follows: (a) she found that Mr. Manolescu was "entitled to be paid for the last two days of the month", during which he was no longer employed by the Employer and (b) she did not refer specifically to a portion of the *Act* that supported this finding.

17. Upon review, I find that the Employer's arguments on this point cannot succeed. The Delegate's finding of fact was not that Mr. Manolescu was entitled to be paid for the last two days of the month. Rather, the Delegate found to be incorrect the Employer's deduction of two days of wages, made on the basis that Mr. Manolescu's last day of work was Friday, July 29 and he did not work on the two days remaining in the month of July. The Delegate based this conclusion on finding as a fact that Mr. Manolescu's hours of work were 8:30 a.m. to 4:30 p.m., Monday to Friday, and therefore he would have been off work (i.e. not working) on July 30 and 31. As pointed out in the Director's submissions on this appeal, as of the last day of employment, July 29, Mr. Manolescu would have earned his monthly salary. There was evidence before the Delegate on this point and her view of the facts was one which could be reasonably entertained. The Delegate's decision was based on and supported by section 21(1) of the *Act*:

> Except as permitted or required by this *Act* or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct, or require payment of all or part of an employee's wages for any purpose.

18. The Delegate referred to this section in the Determination and found that there was no provision of this *Act* or any other applicable *Act* which would entitle the Employer to make the deduction. I find that no error of law was made.

19. The other "grounds for appeal" outlined by the Employer do not reveal or suggest any error of law by the Delegate. No misinterpretation or misapplication of law is made out, there was evidence on which the decisions were made, and the Delegate's view of the facts was one that could reasonably be entertained, given the evidence before her. This applies equally to the Employer's argument with respect to the administrative penalty for breach of section 17 that was imposed pursuant to section 98 of the *Act*. The Employer says he is being unfairly penalized for agreeing to Mr. Manolescu's request that he be paid monthly. The Director's submissions point out that a Director (or his or her delegate) has no discretion to consider a party's intent, good faith, or sense of what is fair in imposing an administrative penalty. This accords with the Tribunal's jurisprudence on the matter of mandatory penalties. In *Accton Super-Save Gas Stations Ltd*., BC EST #D067/04, the Tribunal found that considerations of fairness do not provide exceptions to the legislative imperative to impose monetary penalties under section 98. Further, the plain meaning of the legislation does not allow for any discretion in imposing mandatory penalties, and it would be wrong for the Tribunal to ignore the plain meaning of the language of the statute and substitute its own view of what is fair, rational, or logical: *Douglas Mattson*, BC EST #RD647/01 (Reconsideration of BC EST #D148/01).

20. The Employer has failed to show that the Delegate made any error of law.

2. Did the Director fail to observe the principles of natural justice in making the Determination?

21. The principles of natural justice concern themselves with fairness of procedure, simply put: the right to know the case against oneself, to have an opportunity to respond, and to be heard by an unbiased decision maker. On the appeal form, the Employer marked off this ground of appeal, but did not specify any submissions in support. Nevertheless, the following point raised by the Employer may touch upon this ground of appeal and I will consider it here.

22. The Employer says that during the settlement discussions that took place before the Determination was issued, Mr. Manolescu offered to settle the complaint in exchange for a $300.00 payment and the Employer's agreement to drop any current or future small claims actions against Mr. Manolescu. The offer was made through the Director's delegate who had conduct of the case. The Employer indicates that he did not accept the offer because the small claims issue does not involve the employment relationship. The Employer argues that was unfair for Mr. Manolescu to try to leverage his Employment Standards complaint to have the Employer drop the civil claim.

23. The Director's submissions points out that like all settlement discussions, these discussions were held on a "without prejudice" basis and were voluntary and further, the fact that a settlement was not reached had no bearing on the hearing process or the findings in the Determination. The Director's submissions indicate that the parties were offered numerous opportunities to mediate before, during and immediately after the hearing. Ultimately, there was no agreement to settle, and a formal decision in the form of the Determination was issued. The Employer does not advance any evidence or argument to the contrary.

24. In any event, "without prejudice" communications, such as settlement discussions, are generally considered inadmissible before an adjudicative body except for very limited purposes, such as proving a settlement agreement: *Stephen G. Funk*, BC EST #D195/04. In this case, the Employer does not allege that a settlement agreement was reached.

25. The Employer's submissions on this point, and likewise his other submissions, do no indicate any failure on the part of the Delegate to observe the principles of natural justice in reaching the conclusions expressed in the Determination. This ground of appeal does not succeed.

3. Should the appeal be allowed on the basis that there is new and relevant evidence which was not available at the time of the Determination?

26. When a person appeals a Determination on the ground that evidence has become available that was not available at the time the determination was being made, all of the following four conditions must be met before the evidence will be considered:

1. 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;

2. the evidence must be relevant to a material issue arising from the complaint;

3. the evidence must be credible in the sense that it is reasonably capable of belief; and

4. the evidence must have high 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.

(Bruce Davies and others, Directors or Officers of Merilus Technologies Inc., BC EST #D171/03).

27. The Employer submits two documents with his appeal to support his claim that the administrative penalties for breaches of the *Regulation* should be set aside.

28. One is a photocopy of a Record of Employment (the "ROE") made out by the Employer for Mr. Manolescu. The Employer does not provide any reason why the ROE was not submitted to the Director or the Delegate prior to the Determination being made. The ROE appears on its face to have been issued on August 2, 2005, a few days after Mr. Manolescu's last day of work on July 29, 2005. I find that the ROE could have, with the exercise of due diligence, been discovered and presented to the Director prior to the Determination being made. The ROE fails to meet the first branch of the test of admissibility of new evidence. In any event, the Employer says in his final reply that he does not dispute the administrative penalty imposed for the breach of section 46 of the *Regulation*.

29. The second document that the Employer seeks to have admitted as new evidence is a photocopy of a notice entitled "Building Manager Hours of Work" (the "Notice"). The Employer says in his appeal, "This notice was posted in the lobby. I did not provide this notice previously, as I did not see any connection to this notice to Ted's claim for monies therefore I ignored this item. I however now see we have been penalized for this so we are providing a copy of this notice." In the Reasons for Determination, the Delegate notes that the issue of the requirement under section 35 of the *Regulation* to post the resident caretaker's hours of work was identified prior to the hearing date, and in any event, the Director is not limited to the issues raised in the complaint. The Employer testified at the hearing, and had an opportunity to bring the notice to the hearing as part of his evidence that the notice was posted. However, he failed to do so, and appears to be bringing it forward at this juncture only because a penalty has been

imposed. Clearly, the notice fails to meet the first condition of the test for new evidence. Given the foregoing, this ground of appeal advanced by the Employer does not succeed.

30. The Employer's appeal is dismissed.

ORDER

31. Pursuant to Section 115 of the *Act*, I order that the Determination dated June 9, 2006 be confirmed in the amount of $3130.91, together with any interest that has accrued under Section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal