Employment Standards TRIBUNAL

An appeal

- by -

DBD Westcoast Construction Ltd.

- 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.: 2016A/77

DATE OF DECISION: August 16, 2016

DECISION

SUBMISSIONS

John Ramos on behalf of DBD Westcoast Construction Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), DBD Westcoast Construction Ltd. ("DBD") has filed an appeal of a Determination issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on March 2, 2016. In that Determination, the Director found that DBD (the "Employer") had contravened sections 18 and 58 of the *Act* in failing to pay Alan Gazo and Justin Wilson wages and vacation pay. The Director ordered DBD to pay the amount of $3,606.76, representing wages, vacation pay and interest. The delegate also imposed two administrative penalties for the contraventions, for a total amount of $4,606.76.

2. The deadline for filing an appeal of the Determination was 4:30 p.m. on April 11, 2016. On June 20, 2016, DBD appealed the Determination contending that the delegate erred in law and failed to observe principles of natural justice in making the Determination. DBD also sought an extension of time in which to file the appeal.

3. This decision is based on DBD's written submissions, the section 112(5) "record" that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Mr. Ramos is the sole director and officer of DBD, a construction business. DBD was incorporated on April 8, 2008, and dissolved for its failure to file company reports on July 2, 2012. Mr. Ramos was in the process of having the company restored at the time of the hearing of the complaints. DBD was restored effective May 28, 2015.

5. Mr. Gazo and Mr. Wilson ("the complainants") alleged that DBD had contravened the *Act* in failing to pay wages and annual vacation pay.

6. The delegate held a hearing into the complaints on April 25, 2015. Mr. Ramos appeared on behalf of DBD. Mr. Wilson did not appear and, when contacted by telephone, informed the delegate that he could not appear but that his complaint was similar to Mr. Gazo's and consented to Mr. Gazo presenting evidence on his behalf.

7. There was no dispute that Mr. Gazo worked as a carpenter from October 20, 2014, to October 28, 2014, while Mr. Wilson worked as a labourer/carpenter from October 22, 2014, to October 28, 2014.

8. DBD was contracted to construct a riding arena and required two additional people to assist in aspects of the project. Mr. Gazo and Mr. Wilson met with Mr. Ramos on an unspecified date to discuss the work and wage rates. Mr. Ramos said that he informed Mr. Gazo and Mr. Wilson that they were being hired on a trial basis and that, if all parties were satisfied with the work, there could be additional work for them in the future.

9. DBD's contract was terminated on October 29, 2014, and Mr. Ramos told Mr. Gazo and Mr. Wilson not to continue to work at the site. Mr. Gazo agreed that he and Mr. Wilson entered into a contract with the owner of the riding arena to complete the work after DBD's contract was terminated.

10. Neither DBD nor the complainants maintained a record of the hours of work. DBD also did not dispute that it did not pay wages to either complainant.

11. Mr. Ramos contended that the complainants were independent sub-contractors, arguing that they had control over the work they performed, owned their own tools, and assumed a risk of loss.

12. Mr. Gazo agreed that he provided some of his own tools for the work but denied he was an independent contractor. Mr. Gazo said that he was told where to work, and what work to do. He also said that he had worked as an independent contractor prior to working for DBD and that, when he had done so, he received a written agreement setting out the price and conditions and terms of the contract.

13. After considering the definitions of "employee" and "employer" in the *Act*, the purposes of the *Act* and the common law tests for determining an employer/employee relationship, the delegate found that Mr. Gazo and Mr. Wilson were employees.

14. The delegate found that, apart from Mr. Ramos' own testimony, there was no evidence that Mr. Gazo and Mr. Wilson were free to control their own hours of work. He noted that Mr. Ramos testified that he hired the employees on a temporary basis to see how they would work out. The delegate also noted that DBD's lead hand instructed the complainants which job site to report to on any specific day. The delegate also noted that, upon the termination of DBD's horse riding arena contract, Mr. Ramos requested that the complainants leave the job site, which was indicative of an employment relationship.

15. The delegate noted that although Mr. Gazo and Mr. Wilson supplied some personal equipment, DBD also supplied them with much of the equipment necessary to complete the work, including man-lifts and cranes, which was indicative of an employment relationship.

16. There was no evidence before the delegate that Mr. Wilson and Mr. Gazo worked for anyone else during their tenure with DBD.

17. The delegate found that Mr. Wilson and Mr. Gazo were employees, stating, at page R8 of the Determination:

> In summary, I find that DBD has failed to establish that the Complainants were independent sub-contractors. Mr. Ramos has applied specific common law tests in the narrowest of ways to put forward his arguments. The common law tests are not intended to be used as a checklist against which any one fact if proven establishes a person as an independent contractor. For example, Mr. Gazo purchased lumber for the job site and he brought his own tools to work; these facts do not automatically make him an independent contractor. The common law test must be used to inform the definitions set out in the Act and all the factors must be considered in the light of the actual employment relationship of the parties.

18. In the absence of any records, the delegate found that Mr. Wilson and Mr. Gazo each worked at least eight hours a day except for October 26, 2014, and that they were entitled to vacation pay on those wages.

ARGUMENT

19. Mr. Ramos says that he filed the appeal after the statutory deadline because both he and his son were ill, requiring many trips to doctors and specialists. He also says he and his wife had another baby, and that he sustained an injury from which he had to recuperate. Mr. Ramos adds that the [employment standards appeal] process is new to him.

20. Mr. Ramos contends that there were records of the daily hours worked maintained at the job site and they could have easily been produced had, I infer, the delegate asked for them.

21. Mr. Ramos contended that Mr. Wilson's claim should have been denied given that he did not attend the hearing and was not able to be cross-examined.

22. Mr. Ramos argues that Mr. Gazo supplied tools such as a body harness, compressors and nail guns, which are indicative of an independent contractor relationship. Mr. Ramos further argues that the fact that Mr. Gazo worked for the owner of the riding arena after DBD's contract was terminated suggests that he operated as a sub-contractor.

23. Mr. Ramos says that the delegate did not ask him to provide any witnesses in person or by phone nor was he asked to provide any documentation from other sources.

ANALYSIS

24. Section 114(1) of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

> (a) the appeal is not within the jurisdiction of the tribunal;
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> (b) the appeal was not filed within the applicable time limit;
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> (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
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> (d) the appeal was made in bad faith or filed for an improper purpose or motive;
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> (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
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> (f) there is no reasonable prospect the appeal will succeed;
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> (g) the substance of the appeal has been appropriately dealt with in another proceeding;
>
> (h) one or more of the requirements of Section 112(2) have not been met.

25. Section 112(3) of the *Act* provides that a party wishing to appeal a Determination must deliver that appeal to the Tribunal within 30 days of the date of the Determination, if the person was served by registered mail.

26. Section 109(1)(b) of the *Act* provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

27. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are that the party seeking an extension must satisfy the Tribunal that:

> 1. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

2. there has been a genuine and on-going *bona fide* intention to appeal the Determination;

3. the respondent party (*i.e.,* the employer or employee), as well the Director, must have been made aware of this intention;

4. the respondent party will not be unduly prejudiced by the granting of an extension; and

5. there is a strong *prima facie* case in favour of the appellant.

28. These criteria are not exhaustive.

29. Furthermore, extensions will only be granted where there are compelling reasons present (*Moen and Sagh Contracting Ltd.*, BC EST # D298/96).

30. DBD filed its appeal over two months after the statutory time period for doing so. I appreciate Mr. Ramos is busy and may have had some medical issues, however he provided no evidence, other than his own written submission, as to what those medical issues were and how they prevented him from filing the appeal in a timely fashion. Mr. Ramos could have engaged a third party to file the appeal on his behalf, or filed the appeal within the time period and asked for an extension of time to file additional submissions. As the owner of a business, I infer that he has staff whom he could have had assist with the filing of the appeal.

31. There is no evidence DBD had a genuine, ongoing intention to appeal the determination or that either of the employees or the director was made aware of that intention.

32. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

33. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that DBD has not met that burden and dismiss the appeal.

Failure to observe the principles of natural justice

34. Although DBD contends that the Director failed to observe the principles of natural justice, there is nothing in the appeal documentation that supports this ground of appeal.

35. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness".

36. The record confirms that Mr. Ramos was aware of the allegations and participated fully in the hearing. While Mr. Ramos was unable to cross-examine Mr. Wilson, Mr. Wilson gave no evidence. There was nothing preventing DBD from presenting evidence in response to Mr. Wilson's written allegations. Furthermore, the record indicates that there was little substantive difference between the terms of Mr. Wilson's status with DBD and that of Mr. Gazo and DBD which is DBD's main concern on appeal. Mr. Ramos was able to ask questions of Mr. Gazo, both as they related to his complaint as well as that of Mr. Wilson. I am not able to conclude that the delegate failed to comply with the principles of natural justice.

New Evidence

37. In *Re Merilus Technologies Inc.* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

> (a) 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;
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> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
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> (d) 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.

38. Mr. Ramos says that he has time records that were available at the time of the hearing. I note that the delegate issued a Demand for Employer Records including all records relating to hours of work. Those records were to be produced by March 23, 2015, before the hearing of the complaints. DBD produced no records, either voluntarily or in response to the Demand. The Determination states that Mr. Ramos agreed at the hearing that DBD maintained no time records. I find that if time records are what are being referred to, those ought to have been produced at the hearing and do not meet the test for new evidence.

39. Attached to DBD's appeal is a letter from a Dan Rotter dated June 18, 2016. In that letter, Mr. Rotter states that he did not attend the hearing and that his evidence was not previously submitted to the delegate. Neither Mr. Rotter nor Mr. Ramos explains why Mr. Rotter's evidence, which was clearly available at the time of the hearing, was not presented. I infer it was because Mr. Ramos did not call him as a witness. I note that, in the March 23, 2015, Notice of Complaint Hearing, DBD was asked to provide the names of all witnesses he would be calling to give evidence as well as a summary of each witness's evidence. The Notice, which was sent by registered mail, was delivered to DBD. Although Mr. Ramos identified Mr. Rotter, along with three others, as witnesses to appear in person at the complaint hearing, the delegate noted that he did not call any of them at the hearing. Consequently, I do not consider Mr. Rotter's statement to constitute new evidence.

40. DBD's appeal consists, almost entirely, of a repetition of the arguments Mr. Ramos made at the hearing before the delegate. The issue of tools and Mr. Gazo's WCB status, along with other indicators of an independent contractor status were fully considered by the delegate and I find no error in the delegate's conclusion. In any event, Mr. Ramos did not dispute that neither Mr. Gazo nor Mr. Wilson were not paid for their work.

41. The appeal is dismissed.

ORDER

42. Pursuant to section 114 of the *Act*, I deny the appeal. Pursuant to section 115 of the *Act*, I order that the Determination, dated March 2, 2016, be confirmed in the amount of $4,606.76, together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal