Employment Standards TRIBUNAL

An appeal

- by -

Technotrash Recycling British Columbia Ltd.
("Technotrash")

- 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: Shafik Bhalloo

FILE No.: 2008A/98

DATE OF DECISION: October 30, 2008

DECISION

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by Technotrash Recycling British Columbia Ltd. ("Technotrash") of a Determination that was issued on August 13, 2008 (the "Determination") by a delegate (the "Delegate") of the Director of Employment Standards (the "Director").

2. The Determination concluded that Technotrash contravened the *Act* by failing to pay its former employees, Jennifer Misener ("Misener") and Trevor Salembier ("Salembier") (collectively the "Employees"), wages in the amount of $1,920.00, annual vacation pay in the amount of $135.10, overtime pay in the amount of $120.00, compensation for length of service and vacation pay in the total amount of $1,337.71 and ordered Technotrash to pay the Employees the said amounts plus interest of $151.81 thereon pursuant to Section 88 of the *Act*.

3. The Determination also imposed two administrative penalties of $500.00 each on Technotrash pursuant to Section 29(1) of the *Employment Standards Regulation* ("*Regulation*"). The first administrative penalty was in respect of Technotrash's failure to pay the Employees all wages owed to them in compliance with Section 18 of the *Act* and the second administrative penalty was in respect of Technotrash's contravention of Section 46 of the *Regulation* for its failure to produce employment records to the Delegate when demanded during the investigation of the Employees' complaints.

4. Technotrash, through one of its directors and officers, Mr. Robert John Hazel ("Hazel"), appeals the Determination pursuant to Section 112(1)(c) of the *Act* on the basis that evidence has become available that was not available at the time the Determination was being made. I will set out the alleged "new evidence" under the heading "Technotrash's Submissions" herein.

5. While Technotrash has not formally appealed the Determination on the basis of the failure of the Director to observe the principles of natural justice in making the Determination pursuant to Section 112(1)(b) of the *Act*, Technotrash's written submissions appear to invoke the said ground of appeal. In particular, Hazel, on behalf of Technotrash, submits under the heading "Employer Opportunity to Respond" that Technotrash did not receive any correspondence on the matter "confirmed by Canada Post" and asks the Director to provide documentation proving the contrary. Accordingly, I will deal with the natural justice ground of appeal in this Decision as well.

6. Technotrash is seeking a suspension of the Determination but has not made any submissions in support thereof.

7. Technotrash, by way of remedy, is seeking the Tribunal to refer the matter back to the Director.

8. Technotrash is not seeking an oral hearing of its appeal. Pursuant to Section 36 of the Administrative Tribunal's *Act* and Rule 17 of the Tribunal's Rules of Practice and Procedure, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal may be adjudicated on the written submissions of the parties without resorting to an oral hearing. Accordingly, I will decide the appeal based on the Section 112(5) "record", the submissions of the parties and the Reasons for the Determination.

ISSUES

9. The issues to be determined in this appeal are twofold:

(i) Is there evidence that has become available but was not available at the time the Determination was being made, and if so, does that evidence justify changing or varying the Determination in any manner or returning the matter to the Director?

(ii) Did the Director fail to observe the principles of the natural justice in making the Determination?

FACTS

10. Technotrash operates a recycling business in Vancouver and Kelowna and employed Misener as its Office Manager during the period April 9, 2007 to October 31, 2007. Technotrash also employed Salembier as a Receiver from September 26, 2006 to October 31, 2007.

11. On January 11, 2008, both employees filed their Complaints under Section 74 of the *Act* against Technotrash alleging that the latter contravened the *Act* by failing to pay them all wages (the "Complaints"). In particular, both the Employees stated in their Complaints that they were owed regular wages for their last two weeks of employment for the period October 16 to October 31, 2007 and vacation pay thereon. Both the Employees noted in their Complaints "new owners came in and decided they didn't want to keep me as their employee".

12. Both the Employees sent to Technotrash their Request for Payment Forms on November 19, 2007 and when they did not receive a response from the latter, they filed their Complaints on January 11, 2008.

13. Both the Employees provided copies of their pay statements and relevant time sheets for the pay period in question and informed the Delegate, during the latter's investigation of the Complaints, that they were terminated by Technotrash's director, Hazel, on November 1, 2007 without any notice when Technotrash was purchased by Technotrash Kelowna.

14. The Delegate notes that the pay statements of both the Employees establish they were paid on a semi-monthly basis and vacation pay was included on each pay cheque. The Delegate also had the benefit of the pay cheques ending October 15, 2007 for both the Employees. The pay cheques for both were drawn on the Kelowna Technotrash bank account, although they were employed by the Vancouver location of Technotrash.

15. Both the Employees informed the Delegate that they did not receive any notice of termination or pay in lieu of notice when their employment was terminated.

16. The Director notes in the Determination that as of the time of preparing the Reasons for the Determination on August 13, 2008, the employer had not returned any of the Delegate's telephone messages or correspondences and did not participate during the Delegate's investigation of the Complaints. More specifically, the Director notes that the Delegate, on February 1, 2008, left a telephone message with a receptionist at Technotrash for Hazel to return the Delegate's call concerning the Complaints but did not hear from Hazel.

17. Subsequently, on February 8, 2008, the Delegate wrote to Technotrash to provide the details of the Complaints and asked Technotrash to contact him no later than February 29, 2008. The said correspondence was sent to Techotrash by registered mail and also included Demands for Employer Records for both the Employees. Technotrash, however, did not respond to the said correspondence although it appears, based on the Canada Post confirmation document in the record, that Technotrash received delivery of the said correspondence on February 11, 2008.

18. Subsequently, on April 1, 2008, the Delegate sent her preliminary findings by registered mail to the registered and records office of Technotrash and to Hazel and the other director and officer of Technotrash, Mr. Beeny Ho Shun Yeung ("Yeung"). The record submitted by the Director contains a confirmation from Canada Post that the correspondences to each of the said parties were delivered successfully. However, the Delegate did not receive any response or acknowledgement to any of the correspondences.

19. Since Technotrash did not respond to any telephone messages and correspondences from the Delegate during the investigation, the Delegate accepted the unchallenged evidence of the Employees in making the Determination.

20. As previously indicated, the Claims advanced by the Employees in the Complaints concerned Technotrash's failure to pay them regular wages for the last two weeks of their employment in and during the period October 16 to October 31, 2007 and vacation pay relating to the wages earned during the said period. However, the Delegate, in reliance on the authority of the Director in Section 76(2) of the *Act*, also investigated two additional matters, namely, the entitlement of the Employees to compensation for length of service pursuant to Section 63 of the *Act* and overtime pay pursuant to Section 40 of the *Act*.

21. Based on the unchallenged evidence of the Employees, the Delegate concluded that Technotrash violated Section 18 of the *Act* in failing to pay the Employees their wages for the period October 16 to October 31, 2007 and vacation pay earned thereon, within 48 hours of the termination of their employment. The Delegate, based on the payroll records produced by the Employees, also found that the Employees were each entitled to overtime pay pursuant to Section 40 of the *Act*. The Delegate also concluded that since the Employees' employment was terminated as a result of the sale of the business, both were entitled to compensation for length of service pursuant to Section 63 of the *Act*. I have referred to the specific amounts relating to each of the said determinations earlier under the heading "Overview" and do not intend to reiterate them here.

22. The Delegate also levied two administrative penalties of $500.00 each against Technotrash pursuant to the *Regulation*. The first penalty was in respect of the failure of Technotrash to pay all wages owing to the Employees in the Determination and the second related to the failure of Technotrash, during the Delegate's investigation of the Complaints, to produce employment records pertaining to the Employees when demanded by the Delegate.

SUBMISSIONS OF TECHNOTRASH

23. Hazel, on behalf of Technotrash, submits that both the Employees were paid all wages owing for the period October 15 to October 31, 2007 and attaches copies of two cheques dated November 1, 2007, each in the amount of $769.69 ("Cheques") and payable to the Employees. The Cheques appear to have been negotiated at a financial institution.

24. The Employees produced to the Delegate during the investigation the Cheques, together with the associated payroll documents including the Canada Revenue Agency forms entitled "Payroll Deductions Online Calculator". These payroll records suggest that the Cheques were wage payments by Technotrash to the Employees for the period ending October 15, 2007 and not the period October 16 to October 31, 2007.

25. With respect to the determination pertaining to overtime pay owed to the Employees, Technotrash does not make any submissions.

26. With respect to compensation for length of service pay, Hazel states that both the Employees were employed at Technotrash's location in Port Coquitlam. He further submits that in July 2007, Technotrash was "forced to close when one of the partners absconded with money, inventory and equipment". Hazel states that he "told all staff that (he) would keep the business afloat personally until (he) was able to find a new investor".

27. Subsequently, in August 2007, Hazel indicates that he engaged in discussions with a new investor for Technotrash, Yeung, who owned E-Tech Management ("E-Tech"). Subsequently, in September 2007, Hazel states that he informed all employees of Technotrash "E-Tech Management Ltd./Technotrash Recycling British Columbia would hire all staff at the new location of 455 Industrial Avenue, Vancouver".

28. Hazel also claims that in mid-September he had a discussion with the Employees and discovered that they had an issue or a problem with the new location of Technotrash as they both lived in Maple Ridge and it was inconvenient for them to travel to the new location of Technotrash in Vancouver despite the company offering them reimbursement for travel costs. Consequently, Hazel states "as a matter of fairness, and in order for [the Employees] to find new employment, I gave them October 15 to 31 off work, with pay" and "assisted them both with phone calls and letters of reference for their new employment …". While Hazel does not expressly state, he very strongly intimates that it was the Employees who resigned from their employment.

29. Hazel further submits that Technotrash "did not receive any correspondence confirmed by Canada Post" at the new business address of Technotrash in Vancouver and seeks such confirmation documentation.

30. Finally, Hazel does not address or respond to the matter of the telephone call the Delegate made to him on February 1, 2008 when she left a message for Hazel with Technotrash's receptionist to have Hazel return her call.

SUBMISSIONS OF EMPLOYEES

31. The Employees, in their reply submissions, indicate that on Saturday, June 2, 2007, they discovered that Technotrash's warehouse had been broken into. Thereafter, on Monday, June 4, 2007, the Employees note that when all staff showed up for work, Hazel advised them that there was no work at the time but he would call them once everything was back to normal. However, Hazel kept the Employees at work with one other employee. Subsequently, on June 7, 2007, the Employees state that Hazel had all employees return to work and advised them that he would keep them posted as to what was going on, although he never did.

32. On August 15, 2007, the Employees state that Hazel advised them of the possibility that Technotrash would relocate to Vancouver. The Employees state that they advised Hazel that they would only work for Technotrash in Vancouver if the company gave them a wage increase to cover their transportation costs from Maple Ridge to Vancouver because their existing wages made it unaffordable for them to travel for work to Vancouver. The Employees also asked Hazel to give them three weeks' advance notice of the termination of their employment if he was unable to give them a wage increase so that they could look for alternative employment.

33. Subsequently, on September 29, 2007, the Employees state that they attended at work and Hazel advised them that the company's business was moving to Vancouver that very day. The Employees state that they had "no choice but to go to Vancouver" and this made them furious.

34. On October 1, 2007, the Employees state that they again spoke with Hazel and reiterated to him their concern that the travel costs to the Vancouver location of Technotrash was unaffordable for them and that they would look for alternative employment unless he paid them more or "a percentage for (their) transportation". Hazel said he would talk to E-Tech's Yeung about "wages and transportation issues" according to the Employees.

35. Thereafter, on October 20, 2007, the Employees state that Hazel went to China with Yeung on business and Misener was left to work from Technotrash's office. The Employees further state that they both worked at Technotrash's office from October 15 to October 31, 2007 and deny receiving any time off during this period.

36. On November 1, 2007 the Employees state that Hazel returned from China and called them into his office and advised them that they "were no longer working for (Technotrash)" and the new owner, Yeung, had requested that they not work for him. At that point, the Employees state that Hazel "then gave us our severance pay. It was for 2 weeks of pay, $769.69 each". Misener states that she then called Hazel back on the same day and inquired when she and Salembier could pick up their cheques for the last two weeks of their employment. Hazel said that he had already paid them. In response, Misener states that she told him that "the amount doesn't add up to what we worked" as the "cheques dated November 1, 2007 … covers our severance pay but we still need the pay for the last 14 days that we worked". In response, Misener states Hazel advised that he would send the Employees payment for the last two weeks of work by mail with their Records of Employment ("ROEs"). Misener states that she then telephoned Hazel the next day (November 2, 2007) to confirm if he had mailed the cheques and the ROEs and Hazel advised her that he was looking for the ROE information and that the Employees would get their cheques and ROEs by the end of the following week. However, the Employees state that the cheques and ROEs did not arrive and their calls to Hazel went unanswered causing them to file the Complaints against Technotrash.

SUBMISSIONS OF DIRECTOR

37. The Director rejects Hazel's contention that Technotrash was unaware of the Complaints. The Director contends that the Employees sent self-help kits to Technotrash and therefore the latter should have been aware of the issue of the Employees' wages and anticipated contact from the Employment Standards Branch (the "Branch").

38. The Director also submits that all telephone messages and correspondences from her to Technotrash and its directors and officers went unanswered. In the case of correspondences sent by registered mail, there is evidence of confirmation of delivery of the correspondences, according to the Director.

39. The Director further submits that the Delegate mailed copies of her preliminary findings to Technotrash and its directors and officers at the addresses provided for them in the corporate registry search for Technotrash but no response was forthcoming from Technotrash or their directors and officers.

40. According to the Director, this is a case of the employer failing or refusing to participate in the investigation and adducing evidence for the first time in the appeal of the Determination, which in the Director's view is inappropriate and should result in the dismissal of the appeal.

41. With respect to the Cheques, the Director states that according to the Employees' payroll records, the Cheques appear to relate to the pay period ending October 15, 2007 and not the pay period October 16 to 31, 2007.

42. However, in the second set of appeal submissions' of the Director, the latter, having had the benefit of the appeal submissions of the Employees, acknowledges that the Employees now indicate that the Cheques relate to their severance payments. This is contrary to the Delegate's earlier understanding that the Cheques were for wages for the period ending October 15, 2007. In the circumstances, the Director submits that if the Employees have received additional wages for length of service, then the Tribunal should vary the amount outstanding in the Determination.

ANALYSIS

43. While Technotrash has checked off in the appeal form the "new evidence" ground of appeal (Section 112(1)(c)), the Tribunal should not mechanically adjudicate Technotrash's appeal based solely on the box that Technotrash has checked off. As indicated by the *Tribunal in Triple S Transmission Inc.,* [2003] B.C.E.S.T.D. No. 14 (Q.L.), the Tribunal, when adjudicating an appeal, should inquire into the nature of the challenge to the determination and then determine whether that challenge, *prima facie*, invokes one of the other statutory grounds. In this case, as previously noted, the nature and content of Technotrash's appeal submissions also points to a second ground of appeal, namely, the "natural justice" ground of appeal in Section 112(1)(b). I propose to deal with this ground of appeal first.

Natural Justice

44. The natural justice ground of appeal in Section 112(1)(b) of the *Act*, in practice, requires that parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision maker. Having said this, the onus is on the appellant relying on the natural justice ground of appeal to persuade the Tribunal, on a balance of probabilities, that it was denied one or another of the principles of natural justice.

45. In the case at hand, Hazel, on behalf of Technotrash, submits that Technotrash did not receive any correspondence from the Delegate or the Branch and seeks confirmation of evidence of Canada Post in this respect.

46. The Director, on the other hand, has pointed out that her telephone call to Hazel at Technotrash's office and her subsequent message left with the receptionist at Technotrash for Hazel to return her call went unanswered. Technotrash did not respond or explain in its appeal submissions why no one at Technotrash, including Hazel, returned the Delegate's call.

47. Further, the February 1, 2008 telephone call of the Delegate to Hazel was a few months after the Employees employed the Branch's recommended self-help kit and requested payment in respect of their claims from Technotrash. More specifically, the Employees sent Hazel their Request for Payment forms at Technotrash's new Vancouver office address. Hazel, in the appeal submissions, does not comment on whether or not Technotrash received the Employee's Request for Payment forms. In my view, Technotrash did receive the said forms but chose not to respond.

48. Further, the Section 112(5) record submitted by the Director supports the latter's assertion in the Determination and subsequently in the appeal that Technotrash was provided numerous opportunities to respond to the Employees' complaints but opted not to. More specifically, the Delegate sent Hazel, at the Vancouver office of Technotrash, a letter by registered mail dated February 8, 2008 enclosing the Employees' Complaints and requesting a response or a contact from Hazel as well as production of employment records pertaining to the Employees by February 29, 2008. The said registered mail including the Demands for Employer Records appear to have been successfully delivered by Canada Post on February 11, 2008 as evidenced by the "track package" document of Canada Post contained in the record. However, there was no response to this correspondence of the Delegate from Hazel or Technotrash.

49. Subsequently, on April 1, 2008, the Delegate sent her preliminary findings by registered mail to the attention of both of the directors of Technotrash at the latter's Vancouver address. The preliminary findings unequivocally directed Technotrash and its directors to provide written reasons in support of their position by April 11, 2008, if they disagreed with the Delegate's preliminary findings. The letter also warned them of the consequences of not responding by the deadline imposed. There is also a Canada Post tracking document evidencing successful delivery of the preliminary findings letter on April 2, 2008. However, since there was no response to the preliminary findings letter of the Delegate by Technotrash or its directors, the Delegate followed up the said letter with a further letter dated July 8, 2008 by registered mail to each of the directors of Technotrash at the directors' home addresses provided on the corporate search of Technotrash. The letters indicated the preliminary findings of the Delegate and the potential liability of the directors personally for wages due. The letters invited both directors to contact the Delegate by July 17, 2008, failing which the Delegate warned that she would issue her determination based on the evidence submitted by the Employees. Canada Post successfully delivered neither of these letters because the addresses of the Directors contained in the corporate search of Technotrash that the Delegate was relying upon were either wrong or not current.

50. In my view, the Delegate made several attempts to contact Technotrash and its directors and those attempts were sufficient and satisfactory to invoke the "deemed service" provision of the *Act* in Section 122(2)(b).

51. I also do not believe that Technotrash and its directors were unaware of the Complaints during the investigation stage and before the Delegate's Determination was made. In my view, this is a classic case of a party being provided ample opportunities to participate and respond to the complaints against it during the investigation stage but deciding not to do so without a good reason. In the circumstances, I do not find any support for cancelling the Determination on the basis of the natural justice ground of appeal.

To the contrary, I think more than reasonable efforts were made by the Delegate to afford Technotrash an opportunity to know and respond to the case against it.

New Evidence

52. In *Re Merilus Technologies Inc*, B.C.E.S.T. # D171/03, the Tribunal delineated four conjunctive requirements that must be met before the evidence will be considered in the appeal. The appellant must establish:

- 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.

53. In this case, there is nothing in the submissions of Technotrash that could not, with the exercise of due diligence on the part of Technotrash, have been discovered and presented to the Director during the investigation of the Complaints and prior to the Determination. The evidence presented by Technotrash as new evidence, particularly the Cheques, existed at least as early as November 1, 2007, if not earlier. Technotrash did simply not adduce the said evidence during the investigation because Technotrash and its directors opted not to respond to the Delegate's many contacts.

54. Having said this, in the ordinary case, I would not feel compelled to analyze or subject the purported new evidence to the balance of the tests delineated in the *Merilus Technologies* case. However, this is an unusual case because the Delegate during the investigation leading to the Determination was led to believe, on the basis of the Employees' payroll documents, that the Cheques represented wages for the Employees for period of employment ending October 15, 2007. However, the Employees, in their appeal submissions, admit that the Cheques constituted payments of compensation for length of service. This admission by the Employees compels me to reconsider the Director's calculations for compensation for length of service together with the interest award in the Determination.

55. In my view, Technotrash should receive credit for the amounts in the Cheques against its obligations to the Employees for compensation for length of service in the Determination. In the case of Salembier, there is a small deficit in the length of service compensation owed to him and in the case of Misener, the payment made to her exceeds Technotrash's obligation to pay her compensation for length of service. In the latter's case, the excess amount should be credited to Technotrash against other wages owed to Misener. Of course, the interest calculations also need to be recalculated by the Director in the circumstances. In all other respects, I confirm the Director's Determination.

ORDER

56. Pursuant to Section 115(a) of the *Act*, I refer the matter back to the Director with specific instructions to the Director to provide Technotrash credit for the payment of $796.69 to each of the Employees against the amounts determined owing to each employee. I also direct the Director to recalculate the interest awards in the Determination as a result. In all other respects, I confirm the Determination.

Shafik Bhalloo
Member
Employment Standards Tribunal