

An appeal

- by -

Pierre Gregoire carrying on business as AAA Upholstery
(“Gregoire”)

- 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 Groves

FILE No.: 2008A/93

DATE OF DECISION: November 13, 2008

DECISION

SUBMISSIONS

Pierre Gregoire	on behalf of AAA Upholstery
Robert W. Joyce	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal brought by Pierre Gregoire carrying on business as AAA Upholstery ("Gregoire") challenging a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") dated July 9, 2008. The Determination resulted from the investigation of a complaint brought by one Jordan Girouard ("Girouard"), a minor, who claimed that he had completed work as an employee for Mr. Gregoire for which no wages were paid.
2. The Delegate decided that Mr. Gregoire had contravened sections 17 and 18 of the *Employment Standards Act* (the "Act") and ordered that he pay wages, vacation pay, and accumulated interest in the amount of \$2,994.28. The Delegate also imposed two administrative penalties in respect of the contraventions, at \$500.00 each. The total found to be owed was therefore \$3,994.28
3. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *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. I have concluded that this appeal shall be decided having regard to the Determination, the Reasons for the Determination, the section 112(5) record, and the submissions I have received, without an oral hearing.

FACTS

4. In his Reasons for the Determination, and submissions delivered for the purposes of this appeal, the Delegate says this:
 - Mr. Gregoire carries on an upholstery business in Fort St. John under the name and style of AAA Upholstery;
 - Mr. Girouard was employed as a labourer by Mr. Gregoire from January 1, 2008 to January 31, 2008, but received no wages for his work;
 - Mr. Girouard filed a complaint with the Employment Standards Branch under section 74 of the *Act*. The Branch commenced an investigation, and Mr. Gregoire was contacted. He advised that he would forward Mr. Girouard's payroll records. He also advised that there was an agreement that wages would be paid after business picked up;
 - Mr. Gregoire did not forward the payroll records as promised. A person identified as "the bookkeeper at the business number" later informed the Delegate, however, that she

had calculated that wages of \$2,814.00 were owed to Mr. Girouard. Mr. Gregoire also advised that he could not pay Mr. Girouard his wages due to a cash flow problem;

- In subsequent communications with the Branch, Mr. Gregoire promised to forward Mr. Girouard's outstanding wages. The Branch later received three post-dated cheques from Mr. Gregoire, but when the first cheque was presented, it was returned NSF. There is no indication in the material as to the amounts those cheques were drawn to pay;
- Relying on the bookkeeper's statement of the amount owed to Mr. Girouard for wages, the Delegate determined that Mr. Gregoire owed Mr. Girouard wages of \$2,814.00 for the period in January, 2008 that Mr. Girouard had performed work;
- As Mr. Girouard had received no wages for this period, the Delegate decided that Mr. Gregoire had contravened sections 17 and 18 of the *Act*. The relevant portion of section 17 requires that at least semi-monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period. Section 18 provides that an employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment, and within 6 days after the employee terminates the employment.

ISSUES

5. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

6. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

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;
 - (c) evidence has become available that was not available at the time the determination was being made.
7. Section 115(1) of the *Act* should also be noted. It says this:

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

 - (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.

8. Mr. Gregoire's Appeal Form discloses that he relies on section 112(1)(c) of the *Act*. He alleges that evidence has become available that was not available at the time the Determination was being made. The information he provides in support may be summarized as follows:
- Mr. Girouard was informed by Mr. Gregoire that he could not afford to pay him for his time until business improved;
 - Mr. Gregoire decided to continue to employ Mr. Girouard because he felt sorry for him and wanted to help him out. He wished to support Mr. Girouard and provide him with training, but his intentions were undermined, at least to a degree, by Mr. Girouard's mother;
 - Mr. Girouard spent most of his time at Mr. Gregoire's premises attending to work he had been assigned at school;
 - Mr. Gregoire is willing to pay Mr. Girouard what he is owed, but he wishes to work out a reasonable payment arrangement. He says that the imposition of \$1,000.00 in administrative penalties is counter-productive, however, given that it was for financial reasons Mr. Gregoire was prevented from paying Mr. Girouard his wages in the first place;
 - Mr. Gregoire challenges the Delegate's calculation of the wages owed at \$2,814.00. In support of this he has provided a work schedule for Mr. Girouard showing his hours worked from January 2, 2008 until February 11, 2008, totaling 165.5, which at \$12.00 per hour amounts to \$1,986.00 before deductions. Mr. Gregoire says that Mr. Girouard agrees with this calculation.
9. In my opinion, all of the items in this list, with the exception of the issue relating to the proper calculation of the amount owed to Mr. Girouard, are insufficient to justify my disturbing the result expressed in the Determination.
10. The Tribunal's right to allow an appeal based on fresh evidence incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask whether the evidence could not, with the exercise of due diligence, have been discovered and presented to the delegate during the investigation or adjudication of the complaint and prior to the determination being made. In other words, was the evidence really unavailable to the party seeking to tender it? At the same time, even if the evidence was not unavailable in this sense, the Tribunal may nevertheless consider it if the appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon the respondent if it is admitted (see *Re Specialty Motor Cars* BC EST #D570/98).

11. Leaving aside for the moment the question of the amount of wages Mr. Gregoire neglected to pay Mr. Girouard, I am not persuaded by anything Mr. Gregoire has said in his material in support of his appeal that the matters he refers to were not matters he could have easily communicated to the Delegate had he wished to do so. It is not apparent to me, therefore, that this information was "unavailable" to him in the sense required by section 112(1)(c). Moreover, the record confirms that Mr. Gregoire neglected to respond to multiple communications from the Delegate during the course of his investigation, and never did respond to the Delegate's request for payroll records. It was only after the Determination was made that Mr. Gregoire produced the work schedule for Mr. Girouard which is appended to his Appeal Form. As stated by the Tribunal in *Senor Rana's Cantina Ltd.* BC EST #D017/05, the clearer it is that there has been a concerted refusal by a party to participate in an investigation, the less likely it will be that the Tribunal will be disposed to allow an appeal on the basis that new evidence should be considered.
12. I am also of the view that the evidence Mr. Gregoire seeks to tender is of little or no probative value. Mr. Gregoire appears to take no serious issue with the conclusion that he employed Mr. Girouard, and that wages are owed. Even if Mr. Girouard can be said to have agreed to a deferral of his right to be paid wages until Mr. Gregoire's business improved, section 4 of the *Act* renders such an agreement of no effect because it violates other minimum requirements of the *Act*, in this case specifically sections 17 and 18. Mr. Gregoire's motives for hiring Mr. Girouard are laudable, but irrelevant. His opinion as to the wisdom of the Delegate's imposing the administrative penalties mandated by the *Act* is also immaterial.
13. Having said this, I am troubled by the Delegate's decision as to the quantum of wages Mr. Gregoire owes to Mr. Girouard. The Delegate rests his decision on information said to have been received in a conversation with "the bookkeeper at the business number" who advised the Delegate that she had calculated Mr. Girouard's outstanding wages at \$2,814.00. In his Complaint and Information Form, Mr. Girouard himself estimates his regular wages owed at \$1,920.00. In his submissions on appeal, Mr. Gregoire calculates the wages owed at \$1,986.00.
14. In order for Mr. Gregoire to be bound by the comments of the bookkeeper, it is my view that the bookkeeper must be shown to have been Mr. Gregoire's agent. In order to establish an agency, the evidence must support a finding that the agent had Mr. Gregoire's actual authority to speak for him, express or implied or, alternatively, that there was apparent authority.
15. I discern no evidence in the record which supports a conclusion that the bookkeeper had actual or express authority to speak on Mr. Gregoire's behalf for the purposes of the complaint. The requisite authority might be implied if there was evidence that the bookkeeper was Mr. Gregoire's employee, rather than a contractor, but the record is silent on this point as well.
16. Nor am I persuaded that the evidence supports a finding that the bookkeeper had apparent authority to bind Mr. Gregoire. Apparent authority requires conduct on the part of the principal that gives rise to the authority. Absent the requisite conduct of the principal there can be no finding of apparent authority. Apart from the fact that the Delegate spoke with the bookkeeper by telephone at Mr. Gregoire's business number, there is nothing in the record which sheds light on the bookkeeper's authority. In my view, that evidence is insufficient to establish conduct on Mr. Gregoire's part from which it must necessarily be inferred that the bookkeeper had authority to bind him with her comments.
17. If, then, the information the Delegate received from the bookkeeper cannot be taken so as to bind Mr. Gregoire, it is my view that it nevertheless constituted evidence obtained by the Delegate during the course of his investigation. What should the Delegate have done with it? In my opinion, the information

was highly important having regard to the decision the Delegate was being asked to make. The Delegate should, therefore, have at least attempted to communicate the \$2,814.00 figure he had received from the bookkeeper to Mr. Gregoire. While the record shows that there may have been communications between the Delegate and Mr. Gregoire after the bookkeeper informed the Delegate that \$2,814.00 in wages were owed, there is no evidence that that number was ever mentioned specifically, or that Mr. Gregoire was ever informed about what the bookkeeper had stated, either personally, or by mail, either registered or otherwise. Mr. Gregoire now challenges the \$2,814.00 figure, and queries how the Delegate came up with it.

18. A similar situation occurred in the case of *Inshalla Contracting Ltd.* BC EST #RD054/06. In that situation, a delegate relied on information received from a bookkeeper for the appellant in making a determination. A reconsideration panel of the Tribunal decided that it had not been established that the bookkeeper had authority to bind the appellant, with the result that communications involving the bookkeeper were not considered to be communications involving the appellant. In the result, the panel concluded that the appellant had not received reasonable notice of the investigation, and ordered that the matter be referred back to the Director for further consideration.
19. The issue that arises, then, is whether it can be said that the Delegate failed to observe the principles of natural justice in making the Determination. The section of the *Act* that is engaged is section 112(1)(b). It is true that Mr. Gregoire has not indicated on his Appeal Form that he challenges the Determination on this basis, but in my opinion it is open to the Tribunal to take a liberal view of the material submitted on an appeal, in order to adjudicate the matters raised in it on their merits, having regard to all the grounds for appeal identified in section 112, and notwithstanding an appellant has not expressly identified a relevant ground when ticking the boxes on the Form (see *Triple S Transmission Inc.* BC EST #D141/03).
20. A plea that a delegate failed to observe the principles of natural justice raises a procedural concern that the proceedings which preceded the making of a determination were in some manner conducted unfairly. Typically, a challenge on this ground asserts that a party did not have an opportunity to know the case against it, or an opportunity to be heard in its own defence. This aspect of the obligation is imported directly into proceedings conducted at the behest of a delegate under the *Act* by virtue of section 77, which requires that if an investigation is conducted, the delegate must make reasonable efforts to give a person under investigation an opportunity to respond.
21. It will be seen that it is only reasonable efforts that are required. What will constitute a reasonable effort in any given case depends on the circumstances of that case, and the context in which the issue arises. Here, Mr. Gregoire appears to have been unresponsive to a number of the Delegate's attempts to communicate with him during the course of the investigation. The information the Delegate received from the bookkeeper as to the amount of wages owed to Mr. Girouard was fundamental to the claim, however. In my opinion, it would not have been unreasonable to have expected the Delegate to at least attempt to confirm this information with Mr. Gregoire, and if that could not be done directly in conversation, then it should have been done by some other means incorporating the requisite degree of assurance that the communication would be received; for example, via registered mail.
22. As there is no evidence sufficient to persuade me that this was done in this case, I have decided that I cannot confirm the Determination, but rather I must refer the complaint back to the Director for further investigation regarding the amount of wages owing to Mr. Girouard.

ORDER

23. Pursuant to section 115(1)(b) of the *Act*, I order that the complaint be referred back to the Director for further investigation regarding the amount of wages owing to Mr. Girouard.

Robert Groves
Member
Employment Standards Tribunal