



An appeal

- by -

JBS Auto Sales and Service Ltd.
(“JBS”)

- 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.: 2015A/121

DATE OF DECISION: October 27, 2015

DECISION

SUBMISSIONS

Sukhdev Singh Jhand

on behalf of JBS Auto Sales and Service Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), JBS Auto Sales and Service Ltd. (“JBS”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 11, 2015 (the “Determination”).
2. The Determination found that JBS had contravened Part 3, section 18 of the *Act* in respect of the employment of Jack Denbow (“Mr. Denbow”), and ordered JBS to pay wages to Mr. Denbow in the amount of \$2,563.24 and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$3,063.24.
3. JBS has filed this appeal on the ground that the Director failed to observe the principles of natural justice in making the Determination. JBS seeks to have the Determination cancelled. The Appeal Form is signed by Sukhdev Jhand (“Mr. Jhand”), the sole director and officer of JBS.
4. On September 17, 2015, the Employment Standards Tribunal (the “Tribunal”) notified Mr. Denbow and the Director that an appeal had been received from JBS, requested production of the section 112(5) “record” (the “Record”) from the Director and notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal, and that following such review, all, or part, of the appeal might be dismissed.
5. The Record was provided by the Director to the Tribunal on September 29, 2015, and a copy was sent to JBS on September 30, 2015. JBS was advised of its right to object to the completeness of the Record; however, JBS did not lodge any objections to the Record and, therefore, the Tribunal accepts it as complete.
6. I have reviewed the appeal, including the written submissions of Mr. Jhand, together with the attachments, and the Record. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Reasons for the Determination (the “Reasons”), the Appeal Form, the written submissions of Mr. Jhand, and my review of the Record that was before the Director when the Determination was being made. Under section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind for any of the reasons listed in subsection 114(1). If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Denbow will, and the Director may, be invited to file further submissions. Conversely, if I find the appeal is not meritorious, I will dismiss it under section 114(1) of the *Act*.

ISSUE

7. The sole issue at this stage of the proceeding is whether there is any reasonable prospect that JBS’ appeal will succeed.

THE FACTS

8. The background information in this section is based on the Reasons unless indicated otherwise.
9. JBS operates an auto sales and service business, and employed Mr. Denbow as a body man at the rate of pay of \$20 per hour.
10. On May 4, 2015, Mr. Denbow filed a complaint under section 74 of the *Act* against JBS, alleging that the latter contravened the *Act* by failing to pay him wages (the “Complaint”).
11. The delegate of the Director conducted a hearing into the Complaint on July 13, 2015 (the “Hearing”). Mr. Jhand attended at the Hearing on behalf of JBS and Mr. Denbow attended on his own behalf.
12. In the Agreed Statement of Facts contained in the record and executed by Mr. Jhand and Mr. Denbow at some time prior to the Hearing or the Determination, JBS contended that Mr. Denbow’s first day of employment was January 7, 2015, and the last on March 10, 2015, while Mr. Denbow contended that his first day was in November 2014 and last on March 11, 2015. However, in the Reasons, the delegate noted that while the parties disagreed on the date Mr. Denbow commenced his employment with JBS, both agreed (presumably at the Hearing) that Mr. Denbow’s last day of employment was March 11, 2015, at which time he quit his employment.
13. The parties agreed that JBS made cash payments to Mr. Denbow, but there was a significant difference in their respective positions about the wages Mr. Denbow earned and the wages he was paid. Mr. Denbow provided copies from his personal notebook which showed some work that he had undertaken for JBS, and a mixture of “notated numbers that were a combination of hours worked and amounts owed”. He also provided two (2) handwritten pages of other work he performed for JBS between November 2014 and December 2014, setting out hours and amounts he was either paid or not paid. These records were not made contemporaneously, were incomplete, covered only a brief period of time, and differed from JBS’ records.
14. The delegate also noted that JBS’ dates on receipts for wage payments made to Mr. Denbow in January 2015 showed similar work to the work listed by Mr. Denbow in his notes that he claimed to have undertaken in November and December. JBS’ records also consisted of a series of photocopied receipts that show Mr. Denbow was paid some wages, but there is no account of the hours he worked. Some of these entries, the delegate notes, were made by JBS after the receipt was issued to Mr. Denbow, because the entries that appear on the photocopied receipts produced by JBS do not appear on the original receipts. However, each receipt was signed by Mr. Denbow before JBS added further entries on the receipts.
15. In these circumstances, the delegate concluded “[i]t is difficult to accept that either version of records provided is any way accurate, or accurately decipherable, and is not sufficiently acceptable to form an opinion about their worthiness to support either the Employer’s or the Complainant’s positions”.
16. At the Hearing, Mr. Denbow testified that he worked a five-day week at five (5) hours per day, which JBS did not contest. However, JBS argued that Mr. Denbow did not commence work in November 2014, as Mr. Denbow states, but, instead, started work on January 7, 2015. In preferring the evidence of JBS that Mr. Denbow commenced employment on January 7, 2015, the delegate said that JBS’ evidence was consistent with the evidence that was provided with respect to the fact that the business closed in December 2014 and re-opened on January 7, 2015. Further, the delegate also took into account that Mr. Denbow’s recollection of his start date with JBS “was vague” and he “appeared confused about his start date only saying it was sometime [sic] in November”.

17. Having decided that Mr. Denbow's start date was January 7, 2015, and the parties agreed on the termination date of March 11, 2015, the delegate went on to conclude that Mr. Denbow worked a total of 46 days at five (5) hours per day, with the exception of February 9, 2015, which was a statutory holiday, being Family Day. More specifically, the delegate calculated Mr. Denbow worked a total of 230 hours (46 days X 5 hours) for gross wages in the amount of \$4,600.00. The delegate then added to this amount an average day's pay of five (5) hours X \$20 per hour equalling \$100.00 for the statutory holiday (Family Day) making the total wages earned by Mr. Denbow at \$4,700.00. The delegate also added to last amount vacation pay at 4% of gross wages earned which amount was \$188.00 and brought the total wages earned by Mr. Denbow to \$4,888.00. The delegate then considered JBS' records which showed that JBS only paid Mr. Denbow a total of \$2,354.00, which left an amount of \$2,534.00, plus interest, owing to Mr. Denbow.
18. In the result, the delegate ordered JBS to pay Mr. Denbow \$2,534.00 for outstanding wages, and levied a penalty of \$500.00 against JBS for contravention of section 18 of the *Act* for failing to pay all wages owed to Mr. Denbow within six (6) days of the latter quitting his employment on March 11, 2015.

SUBMISSIONS OF JBS

19. In his brief written submissions of behalf of JBS, Mr. Jhand delineates issues with Mr. Denbow's work as follows:

Mr. Jack Gary Denbow was hired on January 7th, 2015 on a trial basis, part time. After the first week, my staff and I noticed that he was making lots of mistakes. For an example, his preparation of the bodywork was not right and his painting was over-sprayed and would start to drip down. Customers began to complain and all the tasks had to be redone. I then told Mr. Denbow to please quit the job. At the end of the second week, he told me that he got another job. I then paid him and he signed. After one week, he came back again and I asked him why he had come back. Mr. Denbow's answer was that his new boss did not like him. Then I told him that he is okay but his work is not good. He then asked me for one more chance and said that he will improve his quality of work. I then again, on a trial basis, hired him. He only worked between 3-5 hours a day on a call basis. However, after a couple of days, Mr. Denbow started the same troubles. I again, then asked him to quit the job. Every task he was given, would result in an argument. This happened almost every job. This would make Mr. Denbow madder, and more damage would take place at the garage. For an example, he tried to back up the 2008 Kia Sportage inside the shop and ended up scratching the rear right bumper and breaking the tail light. The next day, Mr. Denbow was tightening a bolt near the windshield of a 2012 Nissan Virsa and hit the ranch [sic] on the windshield and broke it. When I asked him about these damages, he said that in working time, things happen. For proof, I have employer witness and photographs in file. The paint job he did on the 1987 Firefly, resulted in just peeled out paint with bubbles everywhere. I then sent that car to Nate'a [sic] Autobody and Paint Shop. They sanded it completely and repainted it. They also sent me a letter listing Mr. Denbow's mistakes. I have also attached that letter to the proof file. I never cut his wages, even for all the damages and he always got paid, and with his pay, he always signed. On February 28th 2015 he quit the job. Whatever balance he got, I paid and he signed the letter. That letter is also attached to the file.

20. Mr. Jhand attaches to his written submissions a letter dated June 26, 2015, from Nathan Robinson ("Mr. Robinson") of Nate's Auto Body & Paint Shop, who states that he re-painted a 1997 Firefly vehicle which was painted improperly "with the wrong material". This is the vehicle Mr. Jhand claims in his written submissions Mr. Denbow previously worked on and "resulted in just peeled out paint with bubbles everywhere". Mr. Robinson's letter was previously submitted to the delegate and is contained in the Record.
21. Mr. Jhand also attaches a written statement from Amrik S. Thind ("Mr. Thind"), dated June 24, 2015. Mr. Thind's letter was previously submitted to the Director too and forms part of the Record. In the letter, Mr. Thind also sets out issues JBS had with Mr. Denbow's work, including customer complaints. Mr. Thind

says that Mr. Jhand continued paying Mr. Denbow “until it became crystal clear this toxic relationship must be terminated or the business would gain a reputation it could ill afford to have”.

22. Mr. Jhand further submits that he feels that the Employment Standards Branch (the “Branch”) did not listen to or consider his evidence, and made the Determination only based on Mr. Denbow’s evidence. He notes that on July 13, 2015, the date of the Hearing, he attended at the Branch with two (2) witnesses but the delegate told them to sit in the office. He states that despite his two requests to the delegate to talk to the witnesses, the delegate did not talk to them and they left.
23. Mr. Jhand concludes by stating that “Mr. Denbow had no proof which showed that I owe him money”. Mr. Jhand questions why the Determination is for \$2,563.24 when Mr. Denbow was claiming approximately \$1,600 in the Complaint. Mr. Jhand includes with his submissions the same set of receipts JBS previously submitted and part of the Record, showing all payments JBS made to Mr. Denbow. These receipts total about \$2,354.00.

ANALYSIS

24. The burden is on JBS, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal’s intervention. An appeal to the Tribunal is not a re-investigation of a complaint, nor is it intended to be simply an opportunity to re-argue positions taken during the investigation or during the hearing. The grounds upon which an appeal may be advanced are found in subsection 112(1) of the *Act*:

- 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.

25. As previously indicated, JBS has raised a single ground of appeal – failure by the Director to observe principles of natural justice in making the Determination. In *Re: 607730 B.C. Ltd. operating as English Inn & Resort* (BC EST # D055/05), the Tribunal explained that natural justice is an administrative law concept referring to procedural rights that ensure that all parties are provided an opportunity to learn the case against them, afforded the opportunity to present their case and challenge the case of the opposing party, and the right to be heard by an independent decision maker. I am not convinced, in this case, that there was any failure by the Director or the delegate to observe principles of natural justice. Based on my review of the Record, the Reasons and Mr. Jhand’s submissions on behalf of JBS, I find that JBS was given a reasonable opportunity to assert its position and to respond to the position asserted by Mr. Denbow.

26. Having said this, I note that in the submissions of Mr. Jhand, he states that on the date of the Hearing, he brought two (2) witnesses to the Branch and twice asked the delegate to speak with his witnesses, but the delegate did not do so. While the delegate is entitled to manage the case before him and may decline to hear a particular witness’ testimony that is not relevant, in this case, there is nothing in Mr. Jhand’s written submissions stating who the witnesses were, what evidence they would have provided, and how that evidence would have related to the material issue adjudicated at the Hearing – what wages, if any, Mr. Denbow was owed. There is an obligation on JBS to ensure all relevant information and materials supporting its natural justice ground of appeal are included with its appeal. If there was material evidence critical to JBS’ case that

the alleged witnesses would have provided, but JBS was not allowed to call them, then Mr. Jhand or JBS should have included a statement of that evidence in the appeal and explained or analyzed its importance to JBS' case. In the circumstances, I am unable to find anything in the appeal materials that would lead me to conclude that the delegate failed to observe the principles of natural justice, if indeed he failed to speak with the alleged witnesses of JBS if they were brought to the Hearing by Mr. Jhand.

27. I also find that Mr. Jhand, to a significant extent, is re-arguing the evidence and position of JBS at the Hearing. He has re-submitted the receipts showing payments to Mr. Denbow, which were previously submitted to the delegate before the Determination. He also resubmits two (2) written statements – Mr. Robinson's and Mr. Thind's – with a view to re-arguing that Mr. Denbow did not perform his duties as a body man very well. I find irrelevant any criticisms of Mr. Denbow's performance as a body man whether in Mr. Jhand's submissions or in the written statements of Messrs. Thind and Robinson. The sole relevant issue in the Complaint of Mr. Denbow and in the Hearing of the Complaint was whether JBS owed Mr. Denbow any wages and nothing more.
28. I further note that, in the appeal submissions of Mr. Jhand, he has indicated that the last day of Mr. Denbow's employment was on February 28, 2015, when he quit his job with JBS. However, before the Hearing, Mr. Jhand's signature appears on an Agreed Statement of Facts that both parties signed, wherein JBS' position was that Mr. Denbow's last day at work was March 10, 2015. Based on the Reasons, it would appear that JBS did not dispute the end date of Mr. Denbow's employment of March 11, 2015 which Mr. Denbow contended in the Agreed Statement of Facts. It is inappropriate to now submit different evidence of the end date for the first time in the appeal. The time to argue the end date of Mr. Denbow's employment was at the Hearing or earlier when Mr. Jhand or JBS was presented with the Agreed Statement of Facts to execute.
29. I also note that, in the Agreed Statement of Facts, the start date of Mr. Denbow's employment, according to JBS, was January 7, 2015, and the delegate preferred the evidence of JBS over Mr. Denbow's. Further, both parties agreed in the Agreed Statement of Facts that Mr. Denbow "only worked maximum 5 hours a day". In the circumstances, and particularly since neither party had convincing or accurate records of the time Mr. Denbow worked, I find that it was open to the delegate to calculate Mr. Denbow's hours worked based on the dates January 7, 2015, to March 11, 2015, at five (5) hours per day and to add statutory holiday pay for February 9, 2015, and vacation pay (as described in the section entitled Facts above) to arrive at the total amount of \$4,888 for wages and vacation pay Mr. Denbow earned with JBS. I also find that the delegate correctly subtracted all amounts JBS proved (by way of receipts) it paid Mr. Denbow totalling \$2,354.00 to arrive at the total wages owing to Mr. Denbow of \$2,534.00.
30. Therefore, I find JBS' appeal has no prospect of succeeding, and I dismiss it.

ORDER

31. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115(1) of the *Act*, the Determination, dated August 11, 2015, is confirmed, together with any further interest that has accrued under section 88 of the *Act* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal