

An appeal

- by -

Steven Csaba Marte
("Marte")

- 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

TRIBUNAL MEMBER: Ian Lawson

FILE No.: 2004A/52

DATE OF DECISION: July 5, 2004

DECISION

SUBMISSIONS

Amanda Clark Welder	On behalf of the Director
Steven Csaba Marte	On his own behalf

OVERVIEW

This is an appeal by Steven Csaba Marte ("Marte") pursuant to section 112 of the *Act*. The appeal is from Determination ER#101-656 issued by Amanda Clark Welder, a delegate of the Director of Employment Standards, on February 26, 2004. The Determination found that Marte's employer, Appareo Software Inc. ("Appareo"), had not contravened the *Act* and that no wages are owing to Marte. Marte filed an appeal on April 5, 2004. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Marte was employed by Appareo as a Network Technician between May 27 and June 10, 2002. He spent part of his employment travelling to customer premises to service and install computer network equipment. His written contract of employment with Appareo provided he was to be paid an annual salary of \$48,000 and that he was to be reimbursed for all reasonable travel expenses incurred in the performance of his duties. Marte filed a complaint with the Director that he was owed 5 hours of overtime, and that Appareo had failed to reimburse him for \$279.88 in travel expenses. Appareo delivered a "voluntary payment" of \$200.00 to the Director, and attached as a condition to such payment that Marte release any claim he has against it under the *Act*.

Appareo argued that Marte was a "high technology professional" as defined in section 37.8 of the *Employment Standards Regulation* and as such was not entitled to overtime. The delegate accepted Marte's claim of overtime hours and thus rejected Appareo's argument. The delegate was clearly correct in that regard, as there was no evidence that Marte did anything but provide "basic operational technical support," which under the regulation excludes him from being a high technology professional. The delegate's calculation of overtime resulted in Appareo owing \$182.93 to Marte. As the voluntary payment would cover this, the delegate requested Marte execute the release and thereby be able to receive the \$200.00 voluntary payment. Marte declined to execute the release, because he says Appareo still owes him \$279.88 in expenses.

Regarding the expenses, the delegate concluded they did not fall within the definition of "wages" in the *Act* and therefore she had no power to recover these for Marte.

ISSUES

Two issues arise on these facts: first, whether the voluntary payment with the condition attached relieves Appareo of any liability to pay the wages owing; second, whether expenses owing by contract to Marte are recoverable by way of a complaint under the Act.

ANALYSIS

Voluntary payments made by an employer in an effort to resolve a complaint are not addressed in the *Act*. Such payments ought to be encouraged in the interest of efficiency, which is one of the guiding principles by which the *Act* is to be interpreted. The manner in which the delegate handled Appareo's voluntary payment, however, illustrates a problem: How does Marte receive payment of the wages owing if he decides it is not in his interest to sign a release attached as a condition of the voluntary payment? In other words, if for any reason Marte does not sign whatever Appareo wishes him to sign as a condition of payment, how is he to be paid the wages owing?

The delegate makes the following statements in her Determination:

These [overtime] calculations were forwarded to Marte on June 10, 2003 with an explanation of the employer's settlement offer and Marte was asked to review the release provided by the employer as well as a "Receipt of Payment and Termination of Complaint" form provided by the Branch.

On August 20, 2003 Marte provided a response the [sic] Branch indicating that he was not prepared to sign the employer's release or the Branch's "Receipt of Payment and Termination of Complaint" form. He stated "I will accept your resolution for the overtime claim, but unable to sign your letters provided." He indicated that he wished to pursue the issue of his claim for expenses.

The delegate continued:

Marte however, has refused to accept this payment as full and final settlement of his complaint by refusing to sign the Receipt of Payment and Termination of Complaint form I forwarded to him...

Accepting Marte's record of hours worked I have determined that the maximum entitlement for overtime wages is \$182.93 based on the requirements to pay overtime pursuant to section 40 of the Act in force and effect at the time of Marte's employment. The employer has provided a voluntary payment in excess of the statutory obligation. Accordingly, I have determined that no further wages are owed to Marte and accordingly, no further action will be taken with respect to the complaint.

If Marte is to receive payment of the wages owing, the delegate gives him no choice but to meet the conditions Appareo attached to the voluntary payment. In its cover letter to the delegate enclosing a cheque for \$200.00, Appareo said the following:

Please do not give the cheque to Mr. Marte until you obtain a release from him for any future 'Employment Standards' claims or actions against Appareo Software Inc.

It would be greatly appreciated if you could also obtain his signature on the attached 'Payment and Release of Claims' letter and return it to me. However, if Mr. Marte is unwilling to sign this

letter, the cheque can be given to him in return for a signed, full and final discharge of any 'Employment Standards' claims or actions as previously noted.

Appareo's "Payment and Release of Claims" letter states:

The attached payment of \$200.00 by Coastal Range Systems Inc. to Steve Marte (Mr. Marte) is made as full and final settlement of any and all claims made by Mr. Marte against Appareo Software Inc. (Appareo).

By cashing this cheque, you accept this payment as full and final settlement of any and all claims against Appareo and release and forever discharge Appareo and its [sic] respective affiliates, directors, officers, shareholders, employees, heirs and executors from all actions or demands whatsoever.

The Employment Standards Branch "Receipt of Payment and Termination of Complaint" form sent to Marte by the delegate states the following in part:

I, Steven Marte, hereby acknowledge receipt of ... \$200.00 in settlement of my complaint. I understand that the investigation into my complaint is complete and that no further action will be taken on my behalf under the British Columbia Employment Standards Act.

Marte's complaint, of course, includes the issue of his entitlement to expenses, which I will address later in these reasons.

Marte would not be required to sign any form of release had Appareo not made the voluntary payment. The Director apparently exercises no control over the type of conditions which parties might attach to their voluntary payments. In this case, however, Appareo's condition prevented Marte from receiving the payment unless he signed the documents Appareo specified. Further, the delegate made no Determination that wages were owing to Marte, chiefly on account of the voluntary payment. If Marte declined to sign the documents specified by Appareo (regardless whether he was correct or reasonable in doing so), he would end up with nothing. While it is true Appareo did not insist on the full release and would have been satisfied with the Branch's termination of complaint form, that form provides Marte accepts the payment "in settlement" of his complaint. Marte is entitled to refuse to sign that form, because in his view only the overtime part of his complaint has been resolved – he maintains he is entitled to payment of expenses as well.

Even if I find the *Act* cannot help Marte with his claim for expenses, and even if Marte might be overly cautious by refusing to sign the termination of complaint form, and even if there is only the remotest chance the termination of complaint form could be used by Appareo as *res judicata* or some other defence to his expense claim, Marte should not have been required to sign anything in order to receive payment of wages to which he was entitled by law. I therefore find the Determination is in error where it finds no wages are payable to Marte. The Determination should have included a term that if Marte for any reason declines to sign the termination of complaint form and so declines to accept the voluntary payment, then Appareo is ordered to pay wages to him in the amount of \$182.93. This error may be cured by an order varying the Determination pursuant to section 115(1)(a) of the *Act*.

With regard to the expense claim, there is no dispute that Marte's contract of employment includes the following clause:

4.1 In accordance with the policies formulated by the Company from time to time, the Employee shall be reimbursed for all reasonable travelling and other expenses actually and properly incurred by the Employee in connection with the performance of his/her duties and functions. For all such expenses the Employee will keep proper accounts and will furnish statements and receipts to the Company once a month at month's end as and when reasonably required by the Company.

Marte has produced copies of many service orders which indicate he was required to travel in the course of his duties. Appareo filed no submissions in this appeal, and there seems no reason to doubt the validity of Marte's claim that he is owed \$279.88 in travel expenses. The question is whether the Determination is in error by finding these expenses cannot be recovered under the Act.

The first of the *Act's* six purposes set out in section 2 is: "to ensure that employees in British Columbia receive *at least* basic standards of compensation and conditions of employment" (my emphasis). This Tribunal found in *Re Siv Evinger*, BC EST #D331/97, that this language emphasized the *Act's* dual function: to ensure minimum standards, but also to provide a mechanism for the Director to assist employees recover wages and other benefits to which they are entitled. In that case, the vacation pay provisions of the *Act*, like the wage provisions, included the phrase "at least" and so the Director had power to enforce terms of the employment contract that went beyond the *Act's* minimums for wages and vacation pay.

In its wisdom, however, the Legislature has expressly excluded "expenses" from the definition of wages:

"wages" includes

(a) salaries, commissions or money, paid or payable by an employer to an employee for work,

...

but does not include

...

(h) allowances or expenses.

The delegate relied on this provision in concluding she had no power to order Appareo to pay the expenses which it agreed to pay Marte pursuant to the contract of employment.

The question whether the Director may enforce an employment agreement for the payment of travel expenses has arisen many times before the Tribunal, and each time the question has been answered in the negative (see, for example: *Re Boyko*, BC EST #D124/96; *Re Vasiluk*, BC EST #D022/97; *Re Middlegate Development*, BC EST #D188/00; and *Re Fernando*, BC EST #D437/01). The "dual purpose" interpretation of s. 2 of the *Act* as set out in *Re Siv Evinger* (*supra*) is therefore tempered in relation to expenses such as those claimed by Marte. While it would seem appropriate and efficient for the Director to enforce unambiguous terms of an employment agreement requiring an employer to pay money to an employee, the Legislature clearly intended that expenses be excluded from the Director's power to enforce wages. As a creation of statute, the Director's powers are restricted to those set out in the *Act*. I can see no other provision in the *Act* that could support the Director ordering Appareo to pay Marte's expenses. Even the prohibition in section 21(2) against requiring employees to pay the employer's business costs is of no assistance, because here Appareo clearly agreed to reimburse Marte's expenses.

The Tribunal therefore has no choice but to apply the Legislature's clearly-expressed intention and leave Marte to take his own steps to collect the expenses owing to him. This part of the Determination under appeal is correct and Marte's appeal in that regard must be dismissed.

ORDER

Pursuant to section 115(1) of the Act, the appeal is allowed in part and Determination ER#101-656 issued on February 26, 2004 is varied to provide that in the event Marte fails to deliver to the Director by **August 15, 2004** an executed Employment Standards Branch "Receipt of Payment and Termination of Complaint" form respecting the voluntary payment of \$200.00, then Appareo must pay overtime wages to Marte in the amount of \$182.93, together with interest pursuant to section 88 of the Act.

Ian Lawson
Member
Employment Standards Tribunal