

An appeal

- by -

Red Sea Auto & Sales Ltd.  
("Red Sea Auto")

– 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)

and

An application for suspension

- by –

Red Sea Auto & Sales Ltd.  
("Red Sea Auto")

– of a Determination issued by –

The Director of Employment Standards  
(the "Director")

Pursuant to section 113 of the  
*Employment Standards Act* R.S.B.C. 1996, C. 113 (as amended)

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2010A/120 & 2010A/121

**DATE OF DECISION:** November 9, 2010

## DECISION

### SUBMISSIONS

Rod McLeod	Counsel for Red Sea Auto & Sales Ltd.
Christopher E. Hood	on his own behalf
Christina Ewasiuk	on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Red Sea Auto & Sales Ltd. (“Red Sea Auto”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 29, 2010.
2. The Determination was made in respect of a complaint filed by Christopher E. Hood (“Hood”), who alleged Red Sea Auto had contravened the *Act* by failing to pay regular wages, overtime wages and annual holiday pay.
3. The Determination found that Red Sea Auto had contravened Part 3, sections 17, 18 and 28, and Part 7, section 58 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”). The Director ordered Red Sea Auto to pay Hood an amount of \$16,102.93, an amount which included wages and interest.
4. The Director also imposed administrative penalties on Red Sea Auto under Section 29(1) of the *Regulation* in the amount of \$2000.00.
5. The total amount of the Determination is \$18,102.93.
6. In this appeal, Red Sea Auto says the Director erred in law and failed to observe principles of natural justice in making the Determination and seeks to have the Determination cancelled. Red Sea Auto has also grounded the appeal in new evidence coming available that was not available at the time the Determination was being made.
7. Red Sea Auto seeks a suspension of the Determination pending the appeal.
8. The Tribunal has discretion whether to hold an oral hearing on an appeal. None of the parties has sought an oral hearing and the Tribunal has decided an oral hearing is not necessary in this case. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

### ISSUE

9. The issues in this appeal are whether the Director erred in deciding Red Sea Auto was liable to Hood for wages, whether the Director failed to observe principles of natural justice in making the Determination and whether there is new evidence in this appeal that will be accepted by the Tribunal.

## THE FACTS

10. Red Sea Auto operates a used automotive dealership in Kamloops, BC. Hood was employed by Red Sea Auto as a sales person from October 1, 2005, to April 10, 2009, when he terminated his employment because he was not being paid his wages.
11. The Director accepted that Hood had not been paid all of his wages for the months of November and December 2008, January and February 2009 and had not been paid any wages for the months of March and April 2009. The Director found Red Sea Auto had not paid annual vacation pay and Hood was owed annual vacation pay for a period commencing October 1, 2007, and ending April 10, 2009.
12. The Determination outlines efforts to provide Red Sea Auto with an opportunity to respond and unsuccessful attempts to have Red Sea Auto provide information relevant to the claims being made by Hood and meaningfully participate in the complaint process over a period of more than five months. Included in these efforts were several requests by the Director for Red Sea Auto to provide copies of cancelled cheques from their financial institution – as Red Sea Auto had indicated a substantial portion of their records had been lost in a fire – that were not met.
13. The Director made findings in favour of the credibility of Hood and against the credibility of Red Sea Auto on whether or not Hood was paid all wages owed during the period November 2008 to April 2009. Red Sea Auto failed to provide the payroll information demanded by the Director under section 85 of the *Act*.
14. The Director found that Hood was a manager as that term is defined in the *Regulation* and therefore not entitled to overtime. The Director also found Hood was not entitled to additional regular wages.

## ARGUMENT

15. The appeal by Red Sea Auto identifies seven areas – identified as “grounds for appeal” – where it is argued the Director erred. These seven “grounds” can be condensed into four points of appeal:
  1. The Director failed to take into account that Red Sea Auto provided Hood with room and board and the use of an automobile, including fuel and insurance;
  2. The Director erred in accepting Hood’s claim that he had not been paid all wages owed for the period November 2008 to April 2009;
  3. The Director erred in refusing to take into account Red Sea Auto’s evidence of misappropriation of funds by Hood;
  4. The Director Determination should take into account that Hood took three dogs, allegedly having a total value of \$4,000.00, and tools, allegedly valued at \$5,000 to \$10,000, when he left their employ.
16. Red Sea Auto also argues the provision of room and board, automobile and automobile insurance to Hood and the “misappropriation of funds” by him is reason to suspend the effect of the Determination.
17. Both Hood and the Director have responded to the appeal.
18. For his part, Hood denies the allegations made by Red Sea Auto. He says his room and board obligations and automotive costs have been more than paid for by him. He says the cheques provided as “proof” that he was paid the wages he claimed have obviously been altered and/or endorsed by someone other than him. He

alleges the document submitted by Red Sea Auto as support for the allegation of the theft of tools allegation is forged. He does not deny taking the dogs, but says he was told by the principal of Red Sea Auto to do so. He also makes the point that this alleged theft occurred more than 1½ years ago with no steps taken by Red Sea Auto to recover the animals. I note here that the delay has also been raised in response to the allegations of misappropriation of funds and theft of tools.

19. In his reply, Hood questions the hourly wage calculation made by the Director. He has not, however, filed any appeal of that aspect of the Determination. Without an appeal that complies with the requirements of section 112 of the *Act*, including the time limits set out in section 112(3), there is no basis on which a conclusion made in a Determination can be addressed by the Tribunal. I would note, though, that the Director's calculations of Hood's hourly wages were not based on an assessment of his worth to Red Sea Auto's business, but on an application of provisions of the *Act* to the facts as found.
20. Hood opposes a suspension of the effect of the Determination, arguing it would be prejudicial to him to have to wait longer for his unpaid wages.
21. The Director says the appeal shows no error was made in reaching the Determination.
22. The Director says Red Sea Auto provided no evidence showing Hood had made an assignment of wages for any of the purposes claimed in the appeal and consequently no basis for allowing the deductions. The finding that Red Sea Auto had not paid all wages owed to Hood for the period November 2008 to April 2009 was one of fact based on the evidence available. Red Sea Auto failed to provide records requested by the Director. The Determination addressed the issue of alleged misappropriation of funds as being a matter not governed by the provisions of the *Act*. The Director says the same response applies to the alleged theft of the animals and the tools. The Director notes that section 21 of the *Act* does not allow an employer to "*withhold, deduct or require payment of all or part of an employee's wages for any purpose*".
23. The Director does not oppose a suspension of the effect of the Determination provided Red Sea Auto deposits the total amount of the Determination with the Director: section 113(2).
24. In the final replies, counsel for Red Sea Auto notes that Hood does not deny he was provided with room and board and the use of an automobile by Red Sea Auto. He says the business of Red Sea Auto was inconvenienced when Hood suddenly left his employment. He says the Director did not adequately take into account the effect of the fire on Red Sea Auto's business and on their ability to respond to the complaint. Red Sea Auto denies some of the allegation made by Hood and reiterates the allegations relating to the animals and the tools, again noting Hood does not deny taking either the dogs or the tools.

## ANALYSIS

25. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

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 made.*

26. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
27. Red Sea Auto has, in part, grounded this appeal on section 112(1) (c) – new evidence becoming available – and has provided a substantial amount of material that was not provided to the Director before the Determination was made. I shall first address whether any of this material will be considered in this appeal.
28. The Tribunal is given discretion to accept or refuse new or additional evidence. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted.
29. I conclude the new evidence submitted with this appeal should not be accepted.
30. It is apparent the material sought to be submitted with the appeal was available at the time the Determination was being made and could have been provided to the Director during the complaint process. On that basis it will not be considered. As well, I am not satisfied the material is sufficiently credible to be accepted and considered.
31. I also agree with the Director that the Tribunal's view of the attempt by Red Sea Auto to introduce additional evidence at this stage should take into account the failure and/or refusal of Red Sea Auto to respond to the Demand and the requests of the Director to provide documents relevant to the complaint. Having substantially failed or refused to participate in the complaint process and ignored the Director's efforts, to allow Red Sea Auto to enter and argue "new" evidence at this stage would be inconsistent with the objects and purposes of the *Act* and fly in the face of the long standing approach by the Tribunal to such attempts in similar circumstances; see expressed *Tri-West Tractor Ltd.*, BC EST # D268/96 and *Kaiser Stables Ltd.*, BC EST # D058/97.
32. In respect of any suggestion the Director failed to observe principles of natural justice in making the Determination, the Tribunal, in *Imperial Limousine Service Ltd.*, BC EST # D014/05, has briefly summarized the natural justice concerns that typically operate in this context:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST # D050/96.
33. In the circumstances of this appeal, Red Sea Auto's burden in alleging a failure by the Director to observe principles of natural justice is to provide facts which show they have been denied the procedural rights described above. That burden has not been met. On the face of the material before the Tribunal in this

appeal Red Sea Auto was provided with the opportunity required by section 77 of the *Act* and by principles of natural justice to know the case, to present their position and to respond to the position presented by Hood. It is not the fault of the Director that they failed or refused to do so.

34. Finally, I am not persuaded the Director committed any error of law in finding regular wages were owed by Red Sea Auto to Hood. The Director correctly refused to “credit” Red Sea Auto of room and board or to consider the allegations of misappropriation of funds and theft. The reasons for refusing to address these matters are explained in the Determination. To reiterate: the Director found no evidence that Hood had made a written assignment of wages to meet the obligations Red Sea Auto said he had and that section 21 of the *Act* does not allow an employer, either directly or indirectly, to withhold, deduct or require payment of wages for any purpose. The first finding is one of fact which, unless shown to amount to an error of law (which it has not in this case), is not a matter over which the Tribunal has any authority on appeal. The second finding is a correct application of the provisions of the *Act*. Red Sea Auto was not allowed under the *Act* to deduct the room and board and automobile costs from Hood’s wages or to have the Director do so. The Director could not allow, indirectly, what Red Sea Auto could not do directly. The Director correctly noted there were other avenues and remedies available to Red Sea Auto if they wished to pursue the allegations of money owed.
35. For the above reasons, the appeal is denied.
36. Based on this decision, it is unnecessary to consider the request to suspend the effect of the Determination. On the facts here, it would not, in any event, have been granted.

## **ORDER**

37. Pursuant to section 115 of the *Act*, I order the Determination dated July 29, 2010, be confirmed in the amount of \$18,102.93, together with any interest that has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**