

An appeal

- by -

Comtel Integrated Technologies Inc.
("Comtel")

- 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.: 2011A/74

DATE OF DECISION: November 2, 2011

DECISION

SUBMISSIONS

Ed Wall

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Comtel Integrated Technologies Inc. (“Comtel”), filed by its sole director and officer Mr. Allen Sneddon (“Mr. Sneddon”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a determination of the Director of Employment Standards (the “Director”) issued May 6, 2011 (the “Determination”).
2. Comtel operates a telecommunications sales business within British Columbia and employed Alex H. Nichols (“Mr. Nichols”) as an account executive from June 1 to November 30, 2010.
3. On December 9, 2010, Mr. Nichols filed a complaint under section 74 of the *Act* claiming Comtel contravened the *Act* for failing to pay him all wages owing and terminating him without compensation for length of service (the “Complaint”).
4. On March 8, 2011, the parties participated in a mediation session, which unfortunately failed to resolve the Complaint. As a result, the delegate scheduled and conducted a hearing of Mr. Nichol’s Complaint on April 27, 2011 (the “Hearing”), which was attended by Mr. Sneddon but not Mr. Nichols.
5. Based on the evidence adduced at the Hearing, the Delegate concluded in the Reasons for the Determination that there was no evidence to indicate a failure on the part of Comtel to pay Mr. Nichols all wages owing. Further, on the uncontested evidence of Mr. Sneddon, the Delegate also concluded that Comtel terminated Mr. Nichols’ employment for just cause. However, the Delegate also concluded in the Determination that Comtel failed to comply with section 28 of the *Act*, as it did not keep a record of the hours worked by its employees including Mr. Nichols. As a result of this contravention, the Director imposed on Comtel an administrative penalty of \$500.00 under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”).
6. In its Appeal of the Determination, Comtel is seeking the Tribunal to cancel the Determination. The appeal is based on two grounds, namely, that the Director failed to observe the principles of natural justice in making the Determination, and new evidence has become available that was not available at the time the Determination was being made.
7. Neither party has requested an oral hearing of the appeal. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in section 103 of the *Act* and Rule 17 of the Tribunal’s *Rules of Practice and Procedures*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUES

8. The issues in this appeal are twofold, namely:

- a) Did the Director breach of the principles of natural justice in concluding that Comtel breached section 28 of the *Act*?
- b) Is there new evidence that has become available that was not available at the time the Determination was being made, and if so, does that evidence justify cancelling the Determination?

FACTS

9. Comtel's appeal, understandably, is limited to the question of whether the delegate properly concluded that Comtel violated section 28 of the *Act*. Therefore, I will only delineate, under this part, facts pertinent to this issue and not any substantive matters Mr. Nichols raised in his Complaint which are not in issue in Comtel's appeal.
10. Having said this, it is noteworthy from the Reasons for the Determination (the "Reasons") and the section 112(5) record that the delegate, when sending the Notice of Complaint Hearing to the parties via registered mail, included a Demand for Employer Records (the "Demand") to Comtel. In response to the Demand, Comtel sent the Delegate some records, which it intended to rely upon at the Hearing, but did not provide any record of the hours worked each day by Mr. Nichols.
11. Subsequently, at the Hearing, the Delegate, in the Reasons, notes that in his direct evidence Mr. Sneddon that Comtel did not record the hours worked each day by each employee. The Delegate thus concluded that Comtel contravened section 28 of the *Act* and imposed an administrative penalty of \$500.00 for the said contravention under section 29(1) of the *Regulation*.

SUBMISSIONS OF COMTEL

12. In his appeal submissions on behalf of Comtel, Mr. Sneddon states that while he indicated to the Director that he was not recording specific daily hours worked by his sales people, he neglected to mention that he kept daily time sheets for his "technical staff" and that "any hours missed by [his] administration staff are logged".
13. He further submits that in the case of sales staff, they are paid on a commission basis and "can make as much money as they can earn, dependent on their daily activities, skills and efforts, similar to an independent business". He further submits that:

[Sales staff] are paid a guaranteed commission should their efforts fall short, but can and have made up their shortfall, as much as \$12,000 in a month. I have never heard of a commission sales staff having to log daily hours as they are judged based on sales, whether that quota is made with 2 hours a day of effort or 12 hours, it's completely up to the individual sales person. The only benchmark is how much in sales are made, not how many hours are put in, as the hours/effort will usually translate to remuneration, with no restriction on how much they can make.

In short, the salary or hourly staff are obligated to justify the 8 hours a day they to work (sic), but the sales staff are only obligated to justify the minimum commission they are paid by the sales they make, regardless of the hours they work. The \$2500.00 a month in guaranteed commissions they are paid would far exceed any monies possibly due for hours worked over an eight hour day, that any sales staff have ever worked (sic), based on the minimum wage they are obligated to receive.

I find this fine extremely onerous given the circumstances and highly unjustified.

14. Attached to his submissions are four pages of some records that I find undecipherable but appear to be limited records of non-sales or technical staff that he did not adduce at the Hearing or before the Determination was made.

SUBMISSIONS OF THE DIRECTOR

15. The Director submits that all employers are required, under section 28 of the *Act*, to keep an account of the hours worked each day by each employee, regardless of the method of payment. Further, the Director submits that in section 27 of the *Act*, employers are required to report the number of hours worked by each employee on semi-monthly wage statements.
16. In the case of Comtel, the Director notes that Comtel was served a Demand on March 23, 2011, but did not produce any daily hourly records for Mr. Nichols. The Director also notes that the Demand set out an administrative penalty of \$500.00 for failure to produce records.
17. The Director also submits that at the Hearing Mr. Sneddon admitted he did not keep daily hourly records of Mr. Nichols, which records are essential to determine whether Comtel is in compliance with the provisions of the *Act* including statutory holiday pay, overtime and compensation for length of service. The Director also notes that the scope of the adjudicative hearing is not limited to the claims advanced in the Complaint but is far broader and covers issues of compliance with the entire *Act*. Without proper daily hourly records, the Director submits that she is unable to properly determine compliance of the *Act* by employers. As a result, argues the Director, an administrative penalty for breach of section 28 is warranted as a disincentive to employers who contravene the *Act* for failing to keep the necessary records.

ANALYSIS

18. As indicated previously, the appeal of Comtel is based on two grounds, namely, the “natural justice” ground in section 112(1)(b) and the “new evidence” ground in section 112(1)(c).
19. The onus of establishing that the Determination is incorrect and/or should be cancelled rests with Comtel.
20. Having said this, section 28 of the *Act*, in no uncertain terms, requires an employer to maintain certain employment records for each employee. This section reads as follows:
- 28(1) For each employee, an employer must keep records of the following information:
- a) The employee’s name, date of birth, occupation, telephone number and residential address;
 - b) The date employment began;
 - c) The employee’s wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - d) The hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
 - e) The benefits paid to the employee by the employer;
 - f) The employee’s gross and net wages for each pay period;
 - g) Each deduction made by the employee’s wages and the reason for it;
 - h) The dates of the statutory holidays taken by the employee and the amounts paid by the employer;

- i) The dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
 - j) How much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.
21. Related to section 28 of the *Act* is section 85(1) which allows the Director, *inter alia*, to request production of records required to be maintained under the *Act* for inspection. Section 85(1) provides:

85(1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:

...

- (c) inspect any records that may be relevant to an investigation under this Part;

...

- (f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).

22. Section 29(1) of the *Regulation* provides for mandatory administrative penalties where the Delegate finds a contravention of the *Act* has occurred. Section 29(1) provides:

29(1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, the following monetary penalties are prescribed for the purposes of section 98 (1) of the Act:

- a) a fine of \$500 if the Director determines that a person has contravened a requirement under the Act, unless paragraph (b) or (c) applies;
- b) a fine of \$2 500 if
 - i. after the date of a determination under paragraph (a), the Director determines that the person contravened the requirement referred to in that paragraph subsequent to the determination under paragraph (a), and
 - ii. that subsequent contravention occurs within 3 years after the date of the most recent contravention of the same requirement in relation to which there has been a determination under paragraph (a),

unless paragraph (c) applies;

- c) a fine of \$10 000 if
 - i. after the date of a determination under paragraph (b), the Director determines that the person contravened the requirement referred to in that paragraph subsequent to the determination under paragraph (b), and
 - ii. that subsequent contravention occurs within 3 years after the date of the most recent contravention of the same requirement in relation to which there has been a determination under paragraph (b).

23. In the case of Comtel, Mr. Sneddon does not dispute that he admitted at the Hearing that he did not record the hours worked each day by each employee. He simply states that he neglected to mention "that daily time sheets are kept for (his) technical staff". It is clear in his submissions that he does think there is any useful purpose, in the case of sales employees such as Mr. Nichols, for Comtel to keep a record of daily hours worked as sales employees are "paid on commission only" and "they are judged based on sales" and not hours worked. However, in my view, Mr. Sneddon fails to realize that the *Act*, in section 28, imposes on each employer an obligation to maintain certain records including specifically, in subsection (1)(d), "the hours

worked by the employee on each day *regardless of whether the employee is paid on an hourly or other basis*” (*emphasis added*).

24. In the case of Mr. Nichols, he was paid on a commission basis and Comtel, under section 28(1)(d), has an obligation to record all hours he worked. While Mr. Sneddon may have misunderstood that obligation, ignorance of the law is not a justification and I agree with the Director’s Determination that Comtel, by Mr. Sneddon’s own admission in the Hearing, failed to record daily hours worked for Mr. Nichols which is a sufficient basis for the Delegate’s determination that Comtel breached section 28 of the *Act*.
25. As indicated above, section 29 of the *Regulation* is mandatory in its terms. That is, once a delegate makes a finding of contravention under the *Act*, the delegate has no discretion as to whether an administrative penalty under section 29 can be imposed. The amount of the penalty is mandatory and fixed by the *Regulation*. In this case, it appears that this is a first breach of section 28 by Comtel and the Delegate has properly imposed a mandatory administrative penalty of \$500.00 against Comtel.
26. As concerns Comtel’s grounds of appeal - “natural justice” and “new evidence” - I do not find any evidentiary or factual basis in Comtel’s submissions to justify cancelling the Determination. More specifically, in the case of the “natural justice” ground of appeal, I find Comtel has not made any relevant submissions. In the case of the new evidence ground of appeal, I find that the evidence adduced by Comtel in Mr. Sneddon’s written submissions would not satisfy one or more of the four-part test for admitting new evidence set out in the Tribunal’s decision in *Re Merilus Technologies Inc.*, BC EST # D171/03. More specifically, the purported new evidence shows a limited record of some hours worked by some “technical staff” and not sales employees and particularly not Mr. Nichols. Further, while this evidence existed at the time of the investigation of Mr. Nichols’ complaint and before the Determination was made, it was not produced nor does Comtel explain why it was not produced. I also find the purported new evidence irrelevant and lacking any probative value. More specifically, the purported new evidence consists of a recording of some hours of work of employees *other than Mr. Nichols* and therefore not only irrelevant but it would not have on its own or when considered with other evidence, lead the Director to a different conclusion on the material issue.
27. In summary, I find that Comtel has not discharged the burden of establishing that the Determination is incorrect and therefore I dismiss the appeal.

ORDER

28. Pursuant to section 115 of the *Act*, I order the Determination made May 6, 2011, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal