

An appeal

- by -

Smagh Farms and Smagh & Sons Ltd.

(“Smagh”)

- 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: Carol L. Roberts

FILE No.: 2016A/108

DATE OF DECISION: September 28, 2016

DECISION

SUBMISSIONS

Gurtej Smagh on behalf of Smagh Farms and Smagh & Sons Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Smagh Farms and Smagh & Sons Ltd. (“Smagh”) has filed an appeal of a Determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on July 12, 2016. In that Determination, the Director found that Smagh had contravened section 58 of the *Act* in failing to pay Robert McDonald wages. The Director ordered Smagh to pay the amount of \$1,327.58 representing annual vacation pay and interest. The delegate also imposed three administrative penalties in the total amount of \$1,500 for contraventions of the *Act*, for a total amount payable of \$2,827.58.
2. Smagh appeals the Determination, contending that the delegate erred in law and failed to observe the principles of natural justice in making the Determination.
3. This decision is based on Smagh’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Smagh & Sons is a company incorporated in British Columbia. Gurpreet Kaur Smagh and Gurtej Singh Smagh are the directors. Gurpreet Smagh is the sole proprietor of Smagh Farms. Smagh operates farm businesses and provides support services for crop production. Mr. McDonald was employed as a farm worker from January 5, 2015, until October 5, 2015.
5. On March 29, 2016, Mr. McDonald filed a complaint alleging that Smagh contravened the *Act* by failing to pay him regular wages and vacation pay. The delegate held a hearing into Mr. McDonald’s complaint on June 22, 2016. Mr. McDonald appeared on his own behalf. No one appeared on Smagh’s behalf.
6. Mr. McDonald’s evidence is that he was hired by, and worked under the direction of, Raj Smagh. At the time he was hired, he was told he would be paid an hourly rate. Approximately one month later, Mr. Smagh told Mr. McDonald that he would get continuous employment and be paid a salary for all hours of work. Although he was also told he would receive one week paid vacation, Mr. McDonald did not take any paid time off work.
7. On or about October 5, 2015, Mr. Smagh told Mr. McDonald that he had sold his pruning contract and had no more work for him at that time. Although Mr. Smagh told Mr. McDonald that he was not terminated and that he would receive a bonus at Christmas, Mr. McDonald did not receive any further work from Mr. Smagh. Mr. McDonald received a payment in October reflecting his last pay period, and a cheque for \$200 as a Christmas bonus, but contended he was still owed wages and accrued vacation pay.
8. Mr. Smagh was informed of the complaint on April 12, 2016, by an assistant in the Employment Standards Branch. At the time, Mr. Smagh stated that Smagh was Mr. McDonald’s employer but denied that any wages were outstanding.

9. The Branch sent Smagh a Notice of Complaint Hearing for June 22, 2016, by registered mail to Smagh's registered and records office. A copy was also sent by e-mail. The Director also issued a Demand for Employer Records to be provided by June 6, 2016. Canada Post tracking documents indicates that the documents were successfully delivered, and Smagh provided the Branch with some payroll records in advance of the hearing.
10. On June 21, 2016, Mr. Smagh left a voicemail message at the Branch stating that he was very busy with his business and that he did not want to proceed with the hearing on the following day. He re-stated his position that Mr. McDonald was not entitled to vacation pay because he had taken some paid time off, and said that he required additional time to gather witness evidence on that issue. Mr. Smagh also stated that he required an interpreter for those witnesses.
11. The delegate received Mr. Smagh's voice mail message on June 22, 2016, the day of the hearing. She returned Mr. Smagh's call, leaving him a voice mail as well as an e-mail stating that the hearing would not be adjourned on the basis of the information left and urged him to call into the hearing by conference call later that morning. Mr. Smagh did not participate in the teleconference hearing. A clerk from the Employment Standards Branch office left a message for Mr. Smagh that the hearing was proceeding and provided him with dial-in information. No one attended the hearing on Smagh's behalf.
12. The delegate determined that Smagh Farms was Mr. McDonald's employer from January 2015 until March 2015, and that Smagh & Sons was his employer from April 2015 until the end of his employment. The delegate accepted Mr. McDonald's evidence that he was never notified that his employer had changed throughout his employment. She also noted that, in response to the Demand for Records, Mr. Smagh produced payroll records for Mr. McDonald from both Smagh & Sons and Smagh Farms. She also found that Raj Smagh was acting as an authorized representative of both Smagh Farms and Smagh & Sons throughout Mr. McDonald's employment. The delegate determined that Smagh & Sons and Smagh Farms should be treated as one employer under section 95 of the *Act*. Smagh does not appear to challenge this aspect of the Determination.
13. Although the delegate accepted Mr. McDonald's evidence as to his rate of pay, she was unable to conclude, on the evidence before her, that he was owed additional wages and dismissed that aspect of his complaint.
14. Mr. McDonald testified that he did not receive vacation pay and took no paid time off. Although Smagh disputed this assertion, its payroll records showed that no vacation pay was paid to Mr. McDonald and presented no evidence that Mr. McDonald took time off. The delegate determined that Mr. McDonald was entitled to vacation pay.
15. The delegate concluded that Smagh had contravened section 27 of the *Act* in failing to give Mr. McDonald a wage statement each pay day setting out the employee's wage rate, the method used for calculating wages and any deductions from wages. The delegate also determined that Smagh had contravened section 28 of the *Act* in failing to produce payroll records for the period January 5, 2015, until October 4, 2015. The delegate noted that although Smagh had submitted monthly statements of earnings and copies for two cheque memoranda, the production of these documents did not fully comply with the Demand for Employer Records.
16. Smagh argues that Mr. McDonald was hired by two employers, Smagh and Bhuller Farms, and that the Director ought to have included Bhuller Farms in the investigation. Attached to the appeal documents is a copy of some payroll records which Smagh relies on to support its position.

17. Mr. Smagh also asserts that he sought an adjournment of the hearing because he was very busy at the time of the hearing due to the harvesting season and because he did not yet have the necessary interpreters for some of his witnesses.

ANALYSIS

18. Section 114 of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
- (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect that the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112(2) have not been met.
19. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
20. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Smagh has not met that burden.
21. In *JC Creations Ltd. o/a Heavenly Bodies Sport* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an “overly legalistic and technical approach” to the appeal document: “The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned.” I have considered the appeal under each of the statutory grounds of appeal.
- Failure to observe the principles of natural justice*
22. I understand Smagh’s argument to be that that the delegate ought to have granted an adjournment of the hearing, and her decision to deny the adjournment and proceed without the Employer present was a failure to observe the principles of natural justice.
23. The Notice of Complaint Hearing, the receipt of which was not disputed, dated May 19, 2015, set the hearing date for June 22, 2016. The Notice indicated that Employer was to provide a list of persons the Employer intended to call as witnesses, along with a brief summary of the relevant evidence those witnesses were expected to give, to the Branch no later than June 6, 2016. Smagh did not submit a list of witnesses by June 6, 2016, or at any time.

24. The last paragraph of the Notice of Complaint Hearing states as follows:

Adjournments

A request for an adjournment must be made in writing and be delivered to the Branch at least seven days before the scheduled hearing date. It must advise whether the other party consents and include reasons, alternate available dates and supporting documentation if applicable.

Parties should remain prepared to attend the hearing on the originally scheduled date until advised in writing that the adjournment has been granted. If a party does not appear, the hearing may proceed in their absence.

25. Smagh did not seek an adjournment until the day before the hearing. The request was not delivered in writing, it did not advise whether the other party consented and provided no alternate available dates.

26. I find that Smagh had knowledge of the consequences of not appearing as well as the requirements for seeking adjournments. Smagh was aware that, if an adjournment was not granted in writing, a representative or agent should be prepared to attend the hearing, and that the hearing would proceed in its absence. I am not persuaded that the delegate's decision to proceed with the hearing in Smagh's absence constitutes a denial of natural justice.

27. I find no merit to this ground of appeal.

Error of Law

28. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

29. I understand Smagh's argument to be that the delegate erred in law in failing to include Bhullar Sons Ltd. as an Employer. I note that Mr. McDonald's complaint form identified "Smagh and Bhullar Sons Ltd." as the employer. The delegate found no record of Smagh and Bhullar Sons Ltd. in a company search. However, Mr. Smagh confirmed that Smagh Farms and Smagh & Sons were Mr. McDonald's employer in a telephone conversation with Branch officials on April 12, 2016. Furthermore, Smagh's payroll records demonstrated that Mr. McDonald was paid by Smagh. Smagh did not indicate at any point that Mr. McDonald had another employer.

30. In support of its argument that the delegate erred in identifying the proper Employer, Smagh submitted new evidence consisting of documents that suggest Smagh & Bhullar and Sons Ltd. had a partnership and that Mr. McDonald was paid from the partnership account.

New Evidence

31. In *Re Merilus Technologies Inc.* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
32. The material Smagh submits on appeal was clearly available at the time the delegate adjudicated the complaint. Furthermore, as the documents constituted payroll records, they ought to have been provided to the delegate following the Demand for Employer Records.
33. I am also not persuaded that the “new evidence” is credible given that they were submitted for the first time on appeal after a Determination was issued against Smagh.
34. Furthermore, the record demonstrates that Mr. Smagh agreed that Mr. McDonald was employed by Smagh. The limited payroll records submitted by Smagh confirm that he was paid by Smagh. I am not persuaded that the “new evidence” could have led the Director to a different conclusion on the material issues.
35. The appeal is dismissed.

ORDER

36. Pursuant to section 114 of the *Act*, I deny the appeal. Pursuant to section 115 of the *Act*, I order that the Determination, dated July 12, 2016, be confirmed in the amount of \$2,827.58 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal