

An appeal

- by -

Salmon Arm Taxi (1978) Ltd.
("SAT")

- 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.: 2006A/121

DATE OF DECISION: December 14, 2006

DECISION

SUBMISSIONS

Maurice Vetten	on behalf of Salmon Arm Taxi (1978) Ltd.
Karin Doucette	on behalf of the Director of Employment Standards
Judy McLean	on her own behalf
Michael Summerfeldt	on his own behalf

OVERVIEW

1. This is an appeal by Salmon Arm Taxi (1978) Ltd. (“SAT”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued September 8, 2006.
2. Eight employees who drove taxi for SAT filed confidential complaints under section 74 of the Act alleging that they had not been paid regular wages, overtime wages, vacation pay, statutory holiday pay and had not been reimbursed for unauthorized deductions from wages. Because the employees asked that their identities not be revealed, the Branch conducted a confidential audit into the operations of SAT.
3. At issue before the delegate was whether the drivers were employees, and if so, whether they were entitled to wages as claimed.
4. The delegate proceeded by way of investigation. After analyzing the drivers’ responses about their relationship to the company, and SAT’s documents and submissions, the delegate determined that the drivers were employees of SAT rather than independent contractors, as contended by SAT. The delegate further determined that SAT had contravened Sections 45, 46 and 58 of the *Employment Standards Act*, and sections 37.1 (3) and 37.1(4) of the *Employment Standards Regulations* in failing to pay the employees wages, including vacation pay, statutory holiday pay and overtime. The delegate concluded that the employees were, collectively, entitled to wages and interest in the total amount of \$7,758.10. The delegate also imposed a \$2,000 penalty on SAT for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. SAT contends that the delegate failed to observe the principles of natural justice in making the Determination. In SAT’s submission, Mr. Vetter says “the owner was unaware of any action being take (sic) and therefore was not given the opportunity to settle this matter before it went this far”.
6. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). SAT did not seek an oral hearing, and I conclude that this appeal can be adjudicated on the written submissions of the parties. This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUE

7. Whether the delegate failed to observe the principles of natural justice in making the Determination. More specifically, did the delegate advise SAT of the complaints, and give Mr. Vetter an opportunity to respond to those complaints.

ARGUMENT

8. Mr. Vetter submits that he has discovered some “discrepancies” in an audit of the delegate’s calculations. He asserts that he was not given the opportunity to “settle” the matter. He also made submissions regarding the delegate’s calculation of wages, including overtime and expense payments. As I understand the submissions, Mr. Vetter does not dispute the delegate’s determination that the drivers were employees.
9. The delegate’s response suggests that SAT is appealing a corporate determination issued October 16, 2006. In fact, SAT’s appeal is of a Determination issued September 8. It is not clear to what “corporate determination” the delegate is referring, as there is no evidence such a Determination was issued. I have proceeded on the basis that the delegate’s submissions relate to the September 8, 2006 Determination.
10. The delegate submits that Mr. Vetter was fully advised, both directly and through his counsel, what the issues were and what the delegate’s findings would be. The delegate also submits that there were a number of settlement discussions with Mr. Vetter and his counsel, and that Mr. Vetter’s settlement offer was not accepted. The delegate also submits that, although Mr. Vetter suggests that there are discrepancies in the calculations set out in the Determination, he has not identified those, and she is unable to respond.
11. Mr. Summerfeldt and Ms. McLean made submissions regarding Mr. Vetter’s comments on the calculation of wages. They contend that Mr. Vetter is simply trying to delay the collection of the order, and avoid being responsible for his employees.
12. In his reply submission, Mr. Vetter says that he does not feel he owes the drivers wages because he “followed the instructions of the Labour Relations Board” when he purchased the business, which he has subsequently been forced to sell. He asks whether the matter can be settled. He does not, however, identify any alleged discrepancies in the calculations.

THE FACTS AND ANALYSIS

13. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made

14. The burden of establishing the grounds for an appeal rests with an Appellant. SAT must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate.
15. SAT's sole ground of appeal is a failure to observe the principles of natural justice. However, through his submissions, Mr. Vetter seems to suggest another ground of appeal. That is that the delegate erred in finding the drivers to be employees (on the basis that he was "was only following instructions" of the LRB).
16. I shall address both grounds in turn.

Failure to observe the principles of natural justice

17. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. This includes the right to know the case against you, and to respond. The Tribunal has determined that the delegate has a duty of fairness to put key elements of the complaint to an employer so that the employer can properly and effectively respond. (see, for example, *JC Creations operating as Heavenly Bodies Sport* BC EST #RD317/03 and *BWI Business World* BC EST #D050/96) I have reviewed the record, and conclude that SAT, through its counsel, was provided with the nature of the complaints and given opportunity to respond to those allegations in letters dated June 3, June 8, and June 12, 2006. The possibility of settlement was also raised in a number of letters and telephone calls to Mr. Vetter. I am unable to find that the delegate failed to observe the principles of natural justice.

Error of Law

18. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the 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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
19. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
20. In the absence of any detailed submission from Mr. Vetter, I am unable to conclude that the delegate erred in calculating wages owed to the employees.

21. In addition, Mr. Vetter has not provided any compelling evidence or argument in support of his apparent position that the delegate erred in finding that the drivers were employees. A statement that he was only following instructions is an insufficient basis to conclude there is an error of law.
22. The appeal is dismissed.

ORDER

23. I Order, pursuant to Section 115 of the Act, that the Determination, dated September 8, 2006, be confirmed in the amount of \$9,758.10, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal