

An appeal

- by -

Housewise Construction Ltd. carrying on business as Segal Disposal
(“Segal Disposal”)

- 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: Robert C.P. Walker

FILE No.: 2012A/94

DATE OF DECISION: November 22, 2012

DECISION

SUBMISSIONS

Samuel Au	on behalf of Housewise Construction Ltd. carrying on business as Segal Disposal
Yue Ma	on his own behalf
Gagan Dhaliwal, (the “Delegate”)	on behalf of the Director of Employment Standards

INTRODUCTION:

1. Housewise Construction Ltd. carrying on business as Segal Disposal (“Segal Disposal”), appeals pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination of the Director of Employment Standards issued July 20, 2012, together with accompanying Reasons for Determination of the same date. The Determination requires Segal Disposal to pay Yue Ma (the “Respondent”) the sum of \$1300.74 for annual vacation pay and accrued interest. It also imposes first time mandatory administrative penalties for Segal Disposal’s breach of section 58 of the *Act* totalling \$500.
2. Each of the parties has made one or more written submissions on this Appeal. I have reviewed all of them having regard to the issues raised. Section 36 of the *Administrative Tribunals Act* which is incorporated into the *Act* and the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may conduct any combination of written, electronic, and oral hearings. I have determined that I am able to deliberate and make my decisions based upon the numerous written submissions of the parties, the section 112(5) record and the Reasons for the Determination.
3. Segal Disposal’s Appeal Form dated August 24, 2012, states three grounds of appeal. It submits the Director erred in law, failed to observe the principles of natural justice, and, thirdly, that evidence has become available that was not available at the time the Determination was made. The details of Segal Disposal’s written submissions, including three addendums, do not specifically follow those grounds of appeal. But, consistent with the Tribunal’s decision in *Triple S Transmission Inc.* (BC EST # D141/03) I will endeavour to identify and consider all relevant arguments in the appellant’s material as they may relate to the three statutory grounds of appeal.

BACKGROUND FACTS

4. The Respondent commenced employment with Segal Disposal as an accounts manager in May 2010. His final day of employment was December 5, 2011. Whether he quit or was terminated was the main issue before Delegate.
5. On December 22, 2011, the Respondent formally complained under the *Act* that he was entitled to unpaid regular wages, annual vacation pay, statutory holiday pay and compensation for length of service (“CLOS”). On May 8, 2012, the parties mediated the complaint and a formal settlement agreement covering statutory pay and regular pay was entered into and duly executed. That afternoon a hearing was conducted with the parties and witnesses in attendance to determine whether any vacation pay and/or CLOS was payable by Segal Disposal to the Respondent.

6. The Delegate heard evidence from the parties and another witness who gave evidence through an interpreter. The Delegate reviewed numerous documents relating to the issues; including the employment status of the Respondent throughout the time period he worked at Segal Disposal, whether salary payments or other cheques he received included the payment of vacation pay to him, and whether he was terminated by Segal Disposal and was therefore entitled to CLOS. Both parties made submissions to the Delegate including the credibility of the other's evidence and whether certain documents were altered, deleted, or accurate. The Delegate appears to have considered and commented upon those submissions in the Reasons for Determination.
7. On July 20, 2012 the Delegate issued her Determination and supporting Reasons. She determined that vacation pay had not been paid to the Respondent throughout the time period of employment and that the Respondent had quit his job and was therefore not entitled to CLOS.

FACTS AND ANALYSIS

8. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. It provides:

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; and
- (c) evidence has become available that was not available at the time the determination was being made.

Evidence

9. The ground for introducing new evidence is delineated in section 112(1)(c) above.
10. The appellant, Segal Disposal, seeks to introduce "new" corporate records that are documents similar in nature, and dated during the relevant time periods, to documents that were before the Delegate at the hearing. It appears from the accompanying submissions that Samuel Au, Segal Disposal's representative, has reviewed the Reasons for Determination, has searched more company records that existed at the time; and is now wanting to introduce them in an attempt to, among other things, reverse the findings of the Delegate in respect of the amount of annual vacation pay payable, and to attack the credibility of the Respondent.
11. As an example Mr. Au submitted two cheques at the hearing to prove that vacation pay had been paid to the Respondent. After hearing further evidence from the parties the Delegate determined the funds were not vacation pay payments. Mr. Au now seeks to introduce a new cheque he subsequently found in corporate records to confirm vacation pay was paid. There is no explanation from the appellant as to why the cheque could not have been found and produced during the investigation of the complaint; or at the hearing.
12. Section 112(1)(c) of the *Act* has been considered by the Tribunal on many occasions. The Tribunal has set out four conditions that must be met before new evidence will be considered. *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc*, BC EST # D171/03; and *Alano Club of Chilliwack operating as Alano Club Coffee Bar*, BC EST # D094/05.

13. The Appellant (Segal Disposal) must establish that:
- (i) 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 a Determination being made.
 - (ii) the evidence must be relevant to a material issue arising from the complaint.
 - (iii) the evidence must be credible in the sense that it is reasonably capable of belief.
 - (iv) 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.
14. Segal Disposal has not produced any “new” evidence that could not have been found previously by the exercise of due diligence. It has not provided any rational explanation why it could not have been found. It has not met its legal burden to do so. Therefore I decline to exercise my discretion to admit new evidence.
15. Further, Mr. Au seeks to introduce “new” evidence regarding those subjects covered by the formal Settlement Agreement of May 8, 2012. He initially argued that he misunderstood what he was signing and that the agreement wasn’t signed until the end of the day. Otherwise, he would potentially have introduced more or different evidence at the hearing. He says he is not a lawyer. He did not understand the process.
16. It may be that English is a second language for Mr. Au. Ironically he brought an interpreter to the hearing so a witness could testify. He chose not to use the interpreter when he gave evidence or made submissions. Segal Disposal’s written submissions are understandable and prepared by Mr. Au. In response to a submission by the Director, he has recently stated in his latest submission he didn’t read and fully understand the Settlement Agreement until after the hearing.
17. Mr. Au’s latest submission is inconsistent with his earlier submission that the agreement wasn’t entered into until after the hearing. I find that troubling as it appears to be an attempt by him to tailor his submissions in light of clear evidence to the contrary. In any event, it is not my role under section 112(1)(c) of the *Act* to consider “new” evidence for the purpose of quashing, varying, or amending a Settlement Agreement that does not form part of the Determination.

Natural Justice and Error of Law

18. The natural justice and error of law submissions made by Segal Disposal focus on what the Delegate reviewed and how the evidence at the hearing was interpreted when making her determination. Segal Disposal repeats many arguments previously made before the Delegate and that were mentioned and considered in her Reasons for the Determination. Segal Disposal argues that the Delegate erred in law because the “new” evidence clearly indicates her errors. However, if the evidence was not introduced to the Delegate those arguments have no basis or merit. As noted above I have declined to admit any new evidence.
19. In my opinion it is clear from the materials that the Appellant and the Respondent were making opposing legal arguments and giving evidence inconsistent with the other party’s legal positions. The Delegate is obliged to, and did, thoroughly canvass and consider the legal issues and submissions, weighed the evidence, made findings of credibility and committed the Determination to writing. Having regard to Segal Disposal’s submissions I could not find any evidentiary or legal basis to interfere with the Determination based on the evidence and witnesses she had before her at the hearing on May 8, 2012.

20. Segal Disposal did not make any specific argument regarding it being denied natural justice during the hearing. It suggests that if it had understood what the real issues were at the hearing (because of its alleged confusion over the content of the Settlement Agreement) it would have acted differently by calling other relevant evidence. However, on this appeal Segal Disposal initially submitted the agreement wasn't even signed until after the hearing; and then altered its submission when the timing and events surrounding the signing of the settlement became clear. In my opinion Segal Disposal has not met its onus in proving there was a breach of natural justice. On my review of the record and appeal submissions I cannot find a legal basis for such an argument.
21. Section 115(1) of the *Act* provides the Tribunal authority to confirm, vary or cancel the Determination under appeal; or refer the matter back to the Director. I intend to confirm the Determination.

ORDER

22. I Order that the Determination under appeal be confirmed pursuant to section 115(1)(a) of the *Act*.

Robert C.P. Walker
Member
Employment Standards Tribunal