

An appeal

- by -

Brain Buster Inc. carrying on business as Mind Games Coquitlam  
("Brain Buster")

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2017A/129

**DATE OF DECISION:** December 18, 2017

## DECISION

### SUBMISSIONS

Reza Abolghasem

on behalf of Brain Buster Inc. carrying on business as Mind Games Coquitlam

### INTRODUCTION

1. This is an appeal filed by Brain Buster Inc. carrying on business as Mind Games Coquitlam (“Brain Buster”) under subsections 112(1)(b) and (c) of the *Employment Standards Act* (the “*ESA*”) and it concerns a Determination issued by Kara L. Crawford, a delegate of the Director of Employment Standards (the “delegate”), on September 28, 2017. By way of the Determination, the delegate ordered Brain Buster to pay its former employee, Sean B. McVeigh (“McVeigh”), the total sum of \$827.63 on account of unpaid wages (regular wages, overtime pay, statutory holiday pay and vacation pay) and section 88 interest.
2. In addition, and also by way of the Determination, the delegate levied five separate \$500 monetary penalties (see section 98) against Brain Buster based on its contraventions of sections 17, 18, 40, 45 and 46 of the *ESA*. Thus, the total amount payable under the Determination is \$3,327.63.
3. Brain Buster appeals the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(a)) and on the ground that it now has new and relevant evidence (subsection 112(1)(c)).
4. In my view, this appeal has no reasonable prospect of succeeding and, as such, I am dismissing the appeal under subsection 114(1)(f) of the *ESA*.

### FINDINGS AND ANALYSIS

5. As noted above, Brain Buster’s appeal is based on two of the three available statutory grounds – “breach of natural justice” and “new evidence”. I will address each ground of appeal in turn.

#### *Natural Justice*

6. Brain Buster has not specifically segregated, in its written memorandum appended to its Appeal Form, its reasons for appeal into those arguments that separately fall under one or the other of the two appeal grounds alleged. However, as best as I can determine, the only possible assertion that might raise a natural justice argument is the following: “As far as overtime claimed on January 9th, we are completely unaware about this issue until the Determination...” [*sic*].
7. This latter assertion belies its own payroll records that clearly show Mr. McVeigh worked overtime on January 9, 2017, given that the Record shows he worked 10 hours on that particular day (see subsection 112(5) Record, page 254). Brain Buster says that Mr. McVeigh “was paid 8 hours on that day” but maintains that he took unpaid breaks on that day, thereby reducing his compensable hours to 8 for the day. However, this

assertion stands in marked contrast to the evidence given by its sole witness at the hearing: “The Employer provides paid break time [and] break times are not tracked” (delegate’s “Reasons for the Determination (the “delegate’s reasons”) at page R5).

8. I further note that Mr. McVeigh’s testimony at the hearing was that he rarely took breaks (see page R4).
9. Brain Buster now says that if Mr. McVeigh intended to claim overtime for January 9, “he should have notified his Manager and the Head Office...but he never did”. The Record shows that Mr. McVeigh, on various occasions, did complain to Brain Buster about not being paid overtime and, more importantly, whether or not Mr. McVeigh made a specific complaint regarding January 9 is irrelevant – Brain Buster was obliged to pay overtime as and when an employee’s working hours demanded and, as noted above, its own records show Mr. McVeigh worked overtime on January 9.
10. In my view, there is absolutely no merit to the suggestion that the delegate failed to observe the principles of natural justice in making the Determination. Mr. McVeigh’s unpaid wage complaint was the subject of an oral complaint hearing at which both parties were given the opportunity to present their own evidence and to respond to the evidence submitted by the other party.

### ***New Evidence***

11. Brain Buster appended several documents to its Appeal Form and many of these documents are contained in the Record. With respect to the documents that are now before the Tribunal but were not submitted to the delegate, each and every one was available at the time of the hearing and thus could have been presented to the delegate. In light of the strict criteria governing the admissibility of “new evidence” set out in *Davies et al.*, BC EST # D171/03, none of these documents is admissible. This ground of appeal must be dismissed.

### ***Other Arguments***

12. Brain Buster raised three other arguments, none of which neatly falls within either the “natural justice” or “new evidence” ground of appeal. However, merely for the sake of completeness, I will briefly address each argument, none of which has, in my view, any presumptive merit.
13. First, Brain Buster takes issue with the delegate’s finding that employee breaks were, by contract, intended to be paid breaks. As noted above, Brain Buster did not record break times and Mr. McVeigh’s evidence was that he was rarely able to take a meal break. More importantly, however, Brain Buster’s evidence at the hearing was that it provided paid breaks (delegate’s reasons, page R5).
14. Second, Brain Buster challenges the \$500 monetary penalty levied for its contravention of section 18 of the *ESA* (payment of wages on termination). Brain Buster says that it did try to pay all wages due to Mr. McVeigh within the time limit set out in this provision, but the fact that a Determination was issued for unpaid wages – and properly so, in my view – belies any suggest that all wages owed to Mr. McVeigh were paid within the statutory time frame. Shortly put, it is simply not legally possible for an employer to successfully contend that it paid all wages due to a former employee as mandated by section 18 in the face of a valid Determination, issued long after the parties’ employment relationship ended, ordering the employer to pay wages to that former employee.

15. Finally, Brain Buster challenges the monetary penalty issued against it concerning its section 17 contravention (payment of wages earned in a pay period and payment at least semimonthly). Brain Buster says “that the company did not intentionally miss the payment [for wages earned on December 20, 2016] nor have any intentions of not paying them”. However, monetary penalties levied under the *ESA* are civil, not criminal, matters and as such, the criminal law notion of “intention” (*i.e., mens rea*) has no application.

## **ORDER**

16. Pursuant to subsections 114(1)(f) and 115(1)(a) of the *ESA*, this appeal is dismissed and the Determination is confirmed as issued.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**