

An appeal

- by -

A-Class Doors Ltd.
("ACD")

- 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.: 2016A/112

DATE OF DECISION: October 13, 2016

DECISION

SUBMISSIONS

Harleen Jagpal

on behalf of A-Class Doors Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), A-Class Doors Ltd. (“ACD”) has filed an appeal of a Determination issued by a delegate of the Director of the Employment Standards (the “Director”) on July 18, 2016 (the “Determination”).
2. The Determination found that ACD had contravened Part 2, section 18, (payment of wages on termination of employment); Part 4, section 40 (overtime wages); and Part 7, section 58 (vacation pay) of the *Act* in respect of the employment of Jagroop Rai (“Ms. Rai”) and ordered ACD to pay wages to Ms. Rai in the amount of \$1,745.67 inclusive of accrued interest. The Determination also levied administrative penalties against ACD in the amount of \$2,500.00 for breaches of sections 17, 18, 27 and 40 of the *Act*, as well as section 46 of *Employment Standards Regulation* (the “*Regulation*”). The total amount of the Determination is \$4,245.67.
3. ACD has filed an appeal on the grounds 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 when the Determination was being made. ACD seeks to have the Determination changed or varied.
4. The deadline to file the appeal of the Determination was August 25, 2016. The Tribunal received ACD’s appeal on August 16, 2016. The appeal included an Appeal Form and written submissions of Harleen Jagpal (“Ms. Jagpal”), office manager of ACD.
5. On August 25, 2016, the Tribunal notified the parties that an appeal had been received from ACD, and requested the section 112(5) “record” (the “Record”) from the Director and notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review, all or part of the appeal might be dismissed.
6. On August 26, 2016, the Director provided the Tribunal with the Record.
7. On August 31, 2016, the Tribunal sent the Record to ACD and provided the latter with an opportunity to object to the completeness of the Record by September 15, 2016. ACD did not submit any objection and, accordingly, the Tribunal accepts the Record as complete.
8. On September 21, 2016, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed. Consistent with the correspondence of August 25, 2016, from the Tribunal, I have reviewed the appeal submissions and the Record. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Determination, the Reasons for the Determination (the “Reasons”), the Appeal Form, the submissions of Ms. Jagpal and my review of the Record that was before the Director when the Determination was being made. Under section 114 of the *Act*, the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1). If satisfied, the appeal or part of it has some presumptive merit and

should not be dismissed under subsection 114(1), the Tribunal will invite Ms. Rai and the Director to make further submissions. Alternatively, if the appeal is not meritorious, it will be dismissed under subsection 114(1) of the *Act*.

ISSUE

9. The issue to be considered at this stage of the proceeding is whether there is any reasonable prospect the appeal can proceed.

THE FACTS

10. The undisputed facts set out in the Reasons are as follows:
 - ACD operates a door manufacturing business and was incorporated under the laws of British Columbia on February 9, 1993.
 - Parmjit Singh Jagpal (“Mr. Jagpal”) is the sole director and officer of ACD.
 - Ms. Rai was employed as an office assistant with ACD at the rate of \$12.00 per hour from August 28, 2015, until she quit her employment on December 16, 2015.
 - On February 26, 2016, Ms. Rai filed her complaint against ACD with the Employment Standards Branch (the “Branch”) alleging that ACD failed to pay her regular wages, overtime pay, annual vacation pay and statutory holiday pay (the “Complaint”).
 - The delegate of the Director held a hearing into Ms. Rai’s Complaint on July 6, 2016 (the “Hearing”).
 - At the beginning of the Hearing, Ms. Rai withdrew her claim for statutory holiday pay.
 - During her employment with ACD, Ms. Rai remained at her desk during lunch breaks in order to serve customers and answer the telephone.
 - ACD paid Ms. Rai only once per month and did not issue her wage statements.
 - ACD paid Ms. Rai regular wages for all hours she worked from August 28 to November 30, 2015.
 - Ms. Rai was owed overtime wages for hours worked from August 28 to November 30, 2015 and both regular and overtime wages for hours worked from December 1 to December 16, 2015; and annual vacation pay from August 28 to December 16, 2015.
11. At the Hearing, Ms. Rai testified that she was hired as an accounts clerk. She said when the front desk clerk quit, Mr. Jagpal asked her to assume the duties of the desk clerk which entailed working at the front desk, answering the phone, providing customer service and assisting the sales staff.
12. Ms. Rai also testified that ACD paid her only once per month and sometimes did not pay her at all until she asked for her wages. On other occasions, she said, Mr. Jagpal told her that clients had not paid him and therefore, ACD had no money in its account to pay her and would pay her once it received monies.
13. As for the hours she worked at ACD, Ms. Rai testified that she recorded her hours of work but when she left ACD she lost them. She said she did not recall working more than twelve (12) hours in a day. She produced

a copy of her time card for the final pay period from December 1 to 16, 2015, and a copy of a cheque stub dated December 7, 2015, which she indicated was the last time she was paid.

14. On the part of ACD, Ms. Jagpal testified that customers often did not pay bills on time, and when that happened, ACD could not pay its employees on time. She also confirmed that there was one pay period per month and it was at the end of the month. She stated that employees were paid once per month within the ten (10) days after the end of the pay period.
15. Ms. Jagpal also said that had Ms. Rai returned to work after December 16, 2015, ACD would have paid her final wages.
16. Ms. Jagpal agreed that the copy of the time card of Ms. Rai submitted was an accurate record of the hours the latter worked between December 1 and 16, 2015. ACD also provided a summary of the regular and overtime hours Ms. Rai worked from August 28 to December 16, 2015, however, Ms. Jagpal was unable to explain how the hours in the summary were calculated.
17. In the Reasons, the delegate delineated the following three questions arising from the Complaint for his consideration:
 1. What is the amount of regular wages owed to Ms. Rai?
 2. What is the amount of overtime wages owed to Ms. Rai?
 3. What is the amount of annual vacation pay owed to Ms. Rai?
18. With respect to the amount of regular wages owed to Ms. Rai, the delegate notes that the parties both agreed that Ms. Rai was paid all regular wages owed from August 28 to November 30, 2015, and that she is only owed regular wages for hours worked from December 1 to December 16, 2015. Having said this, the delegate also notes that Ms. Rai supplied a copy of her time card for the last period and Ms. Jagpal indicated the time card was accurate. In the circumstances, the delegate concludes that the regular hours of 95.4 recorded in Ms. Rai's time card from December 1 to December 16, 2015, were accurate and went on to determine that she was owed regular wages in the amount of \$1,144.80 (based on \$12.00 per hour x 95.4 hours).
19. Since ACD failed to pay Ms. Rai all wages owed to her by December 22, 2015 – six days after she quit her employment on December 16, 2015 – the delegate concludes that ACD contravened section 18 of the *Act* and levied an administration penalty of \$500.00 against ACD for the said breach.
20. With respect to overtime wages owed to Ms. Rai, the delegate notes that both parties agreed that Ms. Rai was paid her regular rate of pay for all hours worked from August 28 to November 30, 2015, and she admitted she could not recall working more than twelve (12) hours in a day. The delegate also notes that Ms. Rai indicated she did not have evidence to support the amount of overtime wages she claimed in her Complaint. In the circumstances, the delegate determined that ACD's summary of Ms. Rai's hours worked of 25.88 hours from August 28 to November 30, 2015, was the best evidence available of the hours Ms. Rai worked. As both parties agreed that Ms. Rai was paid her regular rate of pay for the said hours worked, she was, therefore, only entitled to the difference between her regular and overtime wage rates which the delegate calculated at \$155.28 (\$6.00 per hour x 25.88 hours).
21. With respect to the period December 1 to December 16, 2015, the delegate notes that Ms. Rai's time card shows that she worked 7.10 hours of overtime which ACD should have paid her at the overtime rate of

\$18.00 per hour. Therefore, the delegate concluded that ACD owed Ms. Rai \$127.80 for overtime pay for this period (\$18.00 per hour x 7.10 hours).

22. The total overtime wages ACD owed Ms. Rai, according to the delegate, is \$283.08.
23. The delegate also levied a single administration penalty of \$500.00 against ACD for its two contraventions of section 40 of the *Act* in failing to pay Ms. Rai overtime wages.
24. With respect to vacation pay, the delegate found that ACD did not pay Ms. Rai any annual vacation pay. As Ms. Rai worked for ACD less than five (5) years, the delegate notes, pursuant to section 58 of the *Act*, she is entitled to annual vacation pay of at least 4% of her total wages. Applying the 4% rate to the \$7,258.20 in regular and overtime wages Ms. Rai earned during her period of employment with ACD, the delegate concluded that ACD owed Ms. Rai \$290.33 in annual vacation pay.
25. The delegate also determined that ACD contravened section 17 of the *Act* for failing to pay Ms. Rai her wages at least semi-monthly and within eight (8) days after the end of a pay period. More particularly, the delegate notes that the parties confirmed that ACD only paid Ms. Rai once per month, at the end of each month. Therefore, the delegate levied a single administrative penalty of \$500.00 against ACD for multiple breaches of section 17 of the *Act*.
26. The delegate also notes that the parties agreed that ACD did not issue wage statements to Ms. Rai at any time during her employment. Section 27 of the *Act* requires that on every payday an employer must give each employee a written wage statement for the pay period. In the result, the delegate found that ACD contravened section 27 of the *Act* and issued ACD a single administrative penalty of \$500.00 for the multiple contraventions of section 27.
27. Finally, the delegate notes that the Branch issued ACD a Demand for Employment Records which was sent by registered mail to ACD on April 22, 2016. Canada Post Tracking confirmed that the registered mail was delivered and signed for by ACD on April 27, 2016. The Demand required ACD to supply the Branch with employment records pertaining to Ms. Rai on or before Monday, May 16, 2016, but ACD only provided a summary of its calculations of the hours worked and wages owed to Ms. Rai about three (3) weeks after the expiry of the deadline on June 8, 2016. Therefore, the delegate found that ACD contravened section 46 of the *Regulation* and issued ACD a further administrative penalty of \$500.00 for this contravention.

SUBMISSIONS OF ACD

28. Ms. Jagpal has made written submissions on behalf of ACD.
29. With respect to the Director's finding that ACD violated section 18 of the *Act* by failing to pay all wages owed to Ms. Rai within six (6) days after she quit her employment, Ms. Jagpal states that Ms. Rai "stopped showing up to work and would not answer phone calls or text messages" and therefore ACD "[d]espite frequent contact attempts ... was not able to get a hold of Ms. Rai" and therefore unable to pay her wages. Furthermore, Ms. Jagpal states that ACD's accounts department did not have Ms. Rai's current address and could not "mail out her cheque".
30. In response to the Director's finding that ACD violated section 46 of the *Regulation* by failing to deliver employer records in a timely fashion to the Branch, Ms. Jagpal states that there was "a communication error as the accountant had produced the employment records ... and forwarded them to the administrative assistant" to email to the Branch but the latter thought they had been mailed out and did nothing.

31. In response to the Director's finding that ACD violated section 58 of the *Act* for failing to pay Ms. Rai her vacation pay, Ms. Jagpal states that Ms. Rai's employment was only for a few months and "she had not reached the period in February when vacation is paid out." She adds that Ms. Rai "departed from her job" before ACD could pay her vacation pay, which would have been paid in her last pay cheque.
32. In response to the Director's finding that ACD violated section 27 of the *Act* for failing to issue wage statements to Ms. Rai, Ms. Jagpal states that ACD is "a long standing company, in operation since 1993" but uses outdated accounting software that "does not allow an option for wage statements to be printed". However, since the Determination, ACD has "now started issuing manual wage statements". She states that ACD was "not aware of this [section 27] of the *Act*" but it is now in compliance of this section.
33. In conclusion Ms. Jagpal states that ACD has been in business since 1993 and employed "its best efforts to comply with standards and regulations" but it has "not been informed of certain [employment standards] requirements". Since the violations by ACD are "first time occurrences" and ACD is now "aware of the requirements [of the *Act*]", the delegate's findings of contraventions in the Determination should be "issued as warnings".

ANALYSIS

34. The grounds of appeal are statutorily limited to those set out in subsection 112(1) of the *Act*, which says:

Appeal of director's determination

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

35. The Tribunal has consistently stated that an appeal is an error correction process and the burden, in the appeal, is on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds set out in section 112(1) of the *Act*.
36. The Tribunal has also consistently stated that an appeal is not a further opportunity for a dissatisfied party to simply reargue the merits of a claim to another decision maker.
37. Having said this, as previously indicated, ACD's appeal is based on the "natural justice" and "new evidence" grounds of appeal. I will deal with each ground of appeal separately below.

(a) Natural Justice

38. In *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05, the Tribunal explained that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision maker.

39. In *Imperial Limousine Services Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; their right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints under the *Act* and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWT. Business World Incorporated*, BC EST #D050/96)

40. The onus is on the party who invokes the natural justice ground of appeal to show that the Director breached the principles of natural justice in making the determination. Having reviewed the Determination, the Record, and the submissions of Ms. Jagpal, I find that ACD has failed to address its disagreement with the Determination in the framework of natural justice. More particularly, I find that ACD has not adduced any cogent evidence to support an allegation of non-compliance with natural justice principles on the part of the Director. I also not find any evidence in the Record that would suggest that ACD was denied any of the procedural rights identified in *Imperial Limousine Service Ltd.*, *supra*. Therefore, I find that ACD failed to show there was a breach of natural justice by the Director and I dismiss this ground of appeal of ACD.

(b) New Evidence

41. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four (4) conditions that must be met before new evidence will be considered. The appellant must establish that:

- (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.

42. I have very carefully reviewed Ms. Jagpal's submissions and I do not find they contain any "new" evidence within the meaning of the tests set out in *Re Merilus Technologies Inc.*, *supra*. I find that ACD's appeal is either based on evidence that was provided to the Director at the Complaint Hearing or it is evidence that existed before the Hearing and could have been discovered and presented to the Director during the adjudication of the complaint and prior to the Determination being made.

43. Having said this, I propose to address each of Ms. Jagpal's submissions below.

44. First, with respect to Ms. Jagpal's submission that ACD was not able to get a hold of Ms. Rai to pay her wages for the period December 1 to December 16, 2015, and did not have her current address to mail her paycheque, I note section 19 of the *Act* sets out precisely the process the employer should employ if an employee cannot be located to pay the employee's wages. In particular, section 19(1)(1.1) states that

employers must forward to the Director all outstanding wages owing to any employee that they are not able to locate within sixty (60) days of the date the wages should have been paid. Under subsection (2), the Director is required to give the employer a receipt for any wages received from the employer and under subsection (3), the Director's receipt for wages is considered as proof that the employer's liability for payment of the wages is discharged to the extent of the amount stated in the receipt. ACD, in this case, failed to submit Ms. Rai's wages to the Director pursuant to section 19 of the *Act*. In the circumstances, I find that the Director correctly concluded that ACD contravened section 18 of the *Act* when it did not pay Ms. Rai all regular wages within six (6) days after she quit her employment on December 16, 2015.

45. With respect to the delegate's finding that ACD violated section 46 of the *Regulation* by failing to deliver, by May 16, 2016, payroll records requested in the Demand issued to ACD, Ms. Jagpal explains that there was some miscommunication internally that resulted in the delayed production of the employer's records to the Branch. In particular, she states that there was "a communication error" between ACD's accountant and its administrative assistant. The accountant delivered to the administrative assistant employment records but the administrative assistant believed that they had already been sent to the Branch and did not email them. It was only on June 8, 2016, about three (3) weeks after the expiry of the deadline for delivering employer records that the Branch received from ACD a summary of its calculations of the hours worked and wages owed to Ms. Rai. Notwithstanding that these documents do not quite comply with the breadth of the request in the Demand, they were provided after the expiry of the deadline for producing employer records and I find that it is the employer's duty to make sure that the Demand was complied with in a timely fashion. Any internal carelessness on the part of ACD's employees or other representatives in this regard does not reduce ACD's liability. I find the delegate properly concluded that ACD violated section 46 of the *Regulation*.
46. With respect to the delegate's conclusion that ACD did not pay Ms. Rai annual vacation pay in violation of section 58 of the *Act*, Ms. Jagpal contends that Ms. Rai left her job and, therefore, ACD did not have "the chance to pay her vacation pay". I find this explanation without any merit. As with regular wages Ms. Rai was owed for the period December 1 to December 16, 2015, the vacation pay owed to her should have been forwarded to the Director pursuant to section 19, if ACD was unable to locate her.
47. With respect to the delegate's conclusion that ACD violated section 27 of the *Act* for failing to issue Ms. Rai wage statements, I find no meritorious basis in Ms. Jagpal's submissions to interfere with the delegate's conclusion. In particular, I find curious Ms. Jagpal's explanation that ACD was unable to issue wage statements to Ms. Rai because it used outdated software but now issues manual wage statements to its employees. It could have issued Ms. Rai manual statements during her period of employment with ACD but it failed to do so.
48. Finally, I also find no merit in Ms. Jagpal's submission that ACD has "made its best efforts to comply with [employment] standards and regulations" and therefore all contraventions found by the delegate in the Determination on the part of ACD should be varied and treated as merely "warnings".
49. In the circumstances, I find that ACD's appeal has no reasonable prospect of succeeding and I dismiss it pursuant to section 114(1)(f) of the *Act*.

ORDER

50. Pursuant to section 115 of the *Act*, I confirm the Determination made on July 18, 2016, together with any additional interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal