Employment Standards TRIBUNAL

An appeal

- by -

Ancient Mariner Awnings & Signs Ltd.
(the “Employer”)

- 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: Matthew Westphal

FILE No.: 2005A/110

DATE OF DECISION: September 8, 2005

DECISION

OVERVIEW

1. This is an appeal by Ancient Mariner Awnings & Signs Ltd. (the "Employer") under s. 112 of the *Employment Standards Act* (the "*Act*") of Determination ER #115-126, dated May 16, 2005 (the "Determination"), issued by a delegate (the "Delegate") of the Director of Employment Standards. The Delegate ordered the Employer to pay wages, overtime, annual vacation pay, and accrued interest to Pedro de Nobriga, Daniel Fell, Benjamin Varnakeshi, and John Hugbert (the "Complainants"). The Delegate also imposed on the Employer administrative penalties of $500.00 and $2,500.00 for contravening sections 40 and 18, respectively, of the *Act*. The Delegate imposed the $2,500.00 penalty on the Employer pursuant to s. 29(1)(b) of the *Employment Standards Act Regulation*, B.C. Reg. 396/95, as amended, because this was the Employer's second contravention of s. 18 within a 3-year period.

2. The Tribunal has decided that this case can be decided without an oral hearing.

ISSUES

1. Did the delegate fail to observe the principles of natural justice in making the Determination?

2. Should the Determination be cancelled or varied based on new evidence that has become available, that was not available at the time the Determination was being made?

BACKGROUND

3. The Employer sells and installs awnings and signs. The Complainants had worked for the Employer as welders, installers, or sales personnel. Each of the Complainants filed complaints with the Director alleging that the Employer had failed to pay all their wages as required by the *Act*:

- Pedro de Nobriga had agreed with the Employer to work in sales for a week without pay to show that he could do the job. The Employer did not deduct any pay from Mr. de Nobriga's first paycheque, but did deduct 40 hours from Mr. de Nobriga's last paycheque after he quit. Mr. de Nobriga complained about the Employer's failure to pay him for all the hours he had worked.

- Daniel Fell complained that the Employer had failed to pay him regular wages, overtime, and annual vacation pay.

- Ben Varnakeshi complained that the Employer had failed to pay him regular wages and annual vacation pay.

- John Hugbert complained that the Employer had failed to pay him regular wages, overtime wages, and annual vacation pay. The Employer had provided Mr. Hugbert with a cheque for $856.41, but had then stopped payment on it.

4. The Delegate states in his reasons for the Determination that on February 16, 2005 he spoke to Mr. Perry Smith, President of the Employer, on the telephone regarding the complaints of Messrs. de Nobriga, Fell, and Varnakeshi (Mr. Hugbert filed his complaint after this date) regarding mediation of these complaints, The Delegate states that although Mr. Smith told him that he would provide a response to the complaints, he never did so.

5. The Delegate decided to investigate the complaints, and wrote to the Employer describing the nature of the complaints, and requesting that the Employer provide both payroll records and its position about whether the wages claimed by the Complainants were truly owed. The Employer provided certain payroll records, but did not otherwise provide a substantive response to the complaints. The Delegate found that the Employer had failed to pay each of the Complainants regular wages, overtime, and annual vacation pay. The Delegate found that the agreement between Mr. de Nobriga and the Employer for Mr. de Nobriga to work without pay for one week, was contrary to s. 4 of the *Act*, and therefore not enforceable against Mr. de Nobriga. The Delegate ordered the Employer to pay the outstanding wages to the Complainants, and imposed administrative penalties for contraventions of ss. 18 and 40 of the *Act*.

SUBMISSIONS

6. The Employer adduced written statements that it never received any telephone call from the Delegate, and that it has already paid all wages owing to the Complainants. On its appeal form, it states that it thought an oral appeal hearing was necessary, because "we were not given enough time to respond. We thought that after the payroll was faxed that the case had been closed." The Employer also sent the Tribunal additional payroll summaries and copies of the front of cheques to the order of each of the Complainants, in support of its contention that it has paid the Complainants all the wages they were owed.

7. Three of the Complainants wrote to the Tribunal opposing the appeal.

- Pedro de Nobriga denies the Employer's assertion that it paid him outstanding wages. Mr. de Nobriga states that he never received the cheque dated November 26, 2005 from the Employer, and points out that a photocopy of the front of a cheque is not proof that the cheque was ever sent and received. He states that he had offered to pick up his cheque from the Employer, and was told that he was not allowed on the premises.

- John Hugbert also denies the Employer's claim that it sent him a cheque to replace the cheque on which the Employer had stopped payment. He points out that the Employer has not provided a cancelled cheque to prove that he received and cashed it. He notes that the Employer has admitted that it owes him the funds represented by the cheque on which it had stopped payment, and says that the Employer has had ample time and opportunity to make payment.

- Ben Varnakeshi states that he never received the cheque issued in his name from Abby Design Ltd. dated December 10, 2004, and that all his other payroll cheques had been paid to him by Ancient Mariner Awning & Signs Ltd. Further, the monies he is claiming were not included on his 2004 income tax turn or recorded on a T4 slip. He states that the Employer has provided no evidence that he cashed this cheque. Mr. Varnakeshi also states that he was told by staff in the Employer's office that Diane Smith had been handling payroll in the absence of another employee, and he provides what purports to be

a letter to the Tribunal from Diane Smith. This letter includes various inflammatory allegations, including that the payroll summaries provided by the Employer for each of the Complainants have been altered. Since I have no assurance of the authenticity of this letter or of the reliability of the information in it, I have not placed any weight on it in deciding this appeal.

8. The Delegate submitted that the Employer has failed to meet its burden of establishing an error of law. He argues that the Employer has provided no evidence to suggest that there has been any error of law. He disputes the Employer's claim that it had not been provided enough time to respond to the Complainants' complaints. He states that he telephoned the Employer to advise it of the nature of the complaints, and to offer mediation services, and provided the Employer with four letters setting out the nature of the four complaints, and requesting a written response to the allegations.

9. In each case, however, the Employer chose not to provide any substantive response to the complaints. The Delegate strongly denies the Employer's claim that the telephone conversation of February 16, 2005 never took place. The Delegate also points out that although the Employer provided copies of the face of certain cheques, it did not provide any evidence – such as copies of the backs of these cheques – that the cheques had been negotiated.

ANALYSIS

10. Although the Employer indicated on its appeal form that it was appealing the Determination on the basis that the Delegate erred in law, it made no submissions regarding error of law. In my view, nothing in the Employer's submissions raises the issue of an error of law, as interpreted by the Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998), 62 B.C.L.R. (3d) 354 (C.A.). (See *J.C. Creations Ltd. (c.o.b. Heavenly Bodies Sport)*, BC EST #RD317/03.)

11. Rather, the Employer's appeal is based essentially on two claims: (1) it was not provided with sufficient time to respond to the Complainants' complaints, and (2) it has, in fact, paid all wages owing to the Complainants. The Employer proffers evidence – namely, payroll records, copies of the front of cheques, and statements that all wages owing had been paid – which was not in the record before the Delegate, in support of this latter assertion. Thus, in my view, the true grounds for the Employer's appeal are that the Delegate failed to observe the principles of natural justice in making the Determination, and that there is new evidence that supports setting aside the Determination. I will adjudicate the appeal on that basis.

Natural Justice

12. The rules of natural justice apply to the Director's investigations, and exist to ensure that parties such as the Employer have notice of the allegations being made against them, and an opportunity to respond to such allegations before a determination is made. It is for this reason that s. 77 of the Act provides that "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond."

13. The Employer denies the Delegate's statement in the Determination that he telephoned the Employer on February 16, 2005, and discussed the complaints of Messrs. de Nobriga, Fell, and Varnakeshi. In support of this assertion, the Employer provides "affidavits" (really, signed letters) from Perry Smith and Basilio

Bermejo, Project Coordinator, stating that no telephone calls from the Delegate were received on February 16, 2005 or at any other time.

14. This evidence does not establish a breach of natural justice. I need not decide whether a telephone call took place between the Delegate and Mr. Smith on February 16, 2005, because even if it did not, this would not establish a breach of natural justice. The Employer does not dispute that it received letters from the Delegate setting out the nature of each of the complaints, and providing a deadline by which to provide a response. Indeed, since the Employer submitted payroll records to the Delegate, clearly it did receive these letters. Although the Employer never provided any substantive response to the complaints, or the additional evidence it seeks to introduce on this appeal (which I consider below) this was not for lack of opportunity.

15. Since I am satisfied that the Employer had notice of the complaints of each of the Complainants, and an opportunity to participate in the investigation of these complaints before the Determination was made, I find that the Employer has not established that the Delegate failed to observe the principles of natural justice in making the Determination, and I dismiss this ground of appeal.

New Evidence

16. The Employer bases its appeal primarily upon evidence – such as payroll summaries, copies of cheques, and statements from Mr. Smith that all the Complainants had been paid what they were owed – that it did not provide to the Delegate during his investigation.

17. A party may appeal a determination under s. 112(1)(c) of the *Act* on the basis that "evidence has become available that was not available at the time the determination was being made". In *Bruce Davies, Dana Epp, Kevin Traas, Chad Northcott, Ross Mrazek and Stephen Hemenway, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03, the Tribunal considered the test for this ground of appeal and held as follows:

> This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> (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;
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> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (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.

18. I need not consider factors (b) through (d) above, because in this case it is clear that the Employer cannot satisfy factor (a). The new evidence tendered by the Employer could all, with due diligence, have been discovered and presented to the Delegate during the investigation of these complaints, and before the Delegate made the Determination. For this reason, I decline to admit the fresh evidence of the Employer, and dismiss this ground of appeal.

ORDER

19. I order, pursuant to s. 115 of the *Act*, that the Determination be confirmed as issued in the amount of **$7,022.18** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Matthew Westphal
Member
Employment Standards Tribunal