Employment Standards TRIBUNAL

An appeal

- by -

Inshalla Contracting Ltd.
("Inshalla")

- 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.: 2005A/155

DATE OF DECISION: November 1, 2005

DECISION

SUBMISSIONS

Carrie Sindia	for Inshalla Contracting Ltd.
Gerard Janveaux	on his own behalf
Cal Mitten	for the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by Inshalla Contracting Ltd. ("Inshalla") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Inshalla appeals a Determination (supported by accompanying "Reasons for the Determination") that was issued by a delegate of the Director of Employment Standards (the "Director") on July 12th, 2005 (the "Determination" and "Reasons", respectively).

2. The Director's delegate determined, following an investigation, that Inshalla owed its former employee, Gerard Janveaux ("Janveaux"), the sum of $1,476.13 on account of unpaid wages and section 88 interest. Further, by way of the Determination the Director also assessed a $500 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation* based on Inshalla's contravention of section 18 (failure to pay wages) of the *Act.* Thus, the total amount payable under the Determination is $1,976.13.

3. In a letter dated October 14th, 2005 the Tribunal's Vice-Chair advised the parties that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held. I note that Inshalla, in its appeal form, requested an oral appeal hearing, however, for reasons that are set out, below, I do not consider that an oral hearing is appropriate in this case.

4. In adjudicating this appeal, I have reviewed the following documents:

- Inshalla's initial appeal documents (filed August 18th, 2005) as well as its further submissions dated September 2nd and October 13th, 2005;
- Mr. Janveaux's submission dated September 21st, 2005;
- the Director's delegate's submission dated September 20th, 2005;
- the section 112(5) "record"; and
- the delegate's Reasons.

THE DETERMINATION

5. As recorded in the delegate's Reasons, Inshalla operated a logging business. Inshalla employed Mr. Janveaux as a "buncher operator" from November 29th to December 9th, 2004 at an hourly wage of $22. It would appear that the business is not currently operating and its operating manager (who was the

company's sole director's husband) is now deceased. This latter individual's spouse—the sole corporate director/officer—did not deal with delegate directly during the investigation; rather the firm's former bookkeeper acted as a "go-between" the parties during the course of the investigation.

6. In any event, the bookkeeper provided certain payroll information and, based on those records, the delegate concluded that Mr. Janveaux was owed regular wages, premium pay pursuant to section 37.7 of the *Employment Standards Regulation*, and concomitant vacation pay (section 58). In determining Mr. Janveaux's unpaid wage entitlement, the delegate accepted that the payroll records should be adjusted to reflect a 30-minute unpaid break for Mr. Janveaux each working day—the actual records did not indicate that any breaks were taken, however, Mr. Janveaux apparently conceded that a 30-minute break per day represented a proper adjustment.

REASONS FOR APPEAL

7. Inshalla appeals the Determination on the ground that it has "new evidence" that was not available at the time the Determination was being made [see section 112(1)(c) of the *Act*]. More particularly, Ms. Carrie Sindia, Inshalla's president, now asserts: "I have proof that [Janveaux] did not work half of the time that he states as well he was sleeping on the job and handing in padded time sheets". Ms. Sindia also asserts: "My foreman at that time, Kyle Moore will write a letter in this regard".

8. Although not specifically advanced as a ground of appeal, a central thrust of the appellant's argument is that Inshalla's former bookkeeper (who dealt with the delegate regarding this dispute) was not authorized to do so and, in fact, did not provide all of the relevant and necessary information that Inshalla could have (and should have) provided. I consider this latter assertion to broadly raise a natural justice issue and, more particularly, an issue with respect to section 77 of the *Act:* "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond." In accordance with the Tribunal's decision in *Triple S Transmission Inc.*, B.C.E.S.T. Decision No. D141/03, I propose to also address whether the Determination should be varied or cancelled on the ground that the Director's delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b)].

THE PARTIES' POSITIONS

Inshalla

9. As noted, Inshalla asks that this appeal be adjudicated on the basis of an oral hearing since "someone other than myself [i.e., Ms. Sindia] spoke on my behalf who did not know all the particulars and was not granted authorization to do so".

10. In her September 2nd submission Ms. Sindia reiterated her previously espoused position: "I have proof that [Janveaux] did not work the time he states as well he was sleeping on the job and handing in padded time sheets" and that the bookkeeper "was never given permission to speak on my behalf". Ms. Sindia also noted that there was "a company policy that all time sheets must be signed by the Supervisor select [and] there was no such time sheets for us to deal with". Ms. Sindia claims that Mr. Janveaux should not have been awarded any wages since he did not work the hours he claimed to have worked. Ms. Sindia asks that the $500 administrative penalty be cancelled and "the interest charged to my company on this determination…be removed". Finally, and once again, Ms. Sindia stated: "My foreman at that time, Kyle Moore will write a letter in this regard, therefore we wish to have this reassessed as soon as possible".

11. In her October 13th submission, Ms. Sindia stated that two other employees can corroborate that Mr. Janveaux was "sleeping on the job" and reiterated her earlier position that the bookkeeper was not authorized to deal with the matter on Inshalla's behalf. Ms. Sindia also attached a one-page handwritten letter apparently signed by Kyle Moore (dated October 6th, 2005) in which he asserts that he was Mr. Janveaux's foreman during his tenure with Inshalla and that it was the company's practice for all time slips to be approved by the foreman prior to payment. With respect to Mr. Janveaux's unpaid wage claim, Mr. Moore states:

> On several occasions [Mr. Janveaux] went back to camp after an 8 hour day, instead of the standard 12. When I questioned [Mr. Janveaux] about his self imposed short shift days he said he was sick. On a separate occasion he said he hurt his ankle. He refused to properly maintain his equipment, which resulted in his equipment breaking prior to his 12 hour shift…he was caught sleeping on the job on more than once occasion, this was witnessed by myself as well as other employees.

Mr. Janveaux

12. In Mr. Janveaux's brief submission dated September 21st, 2005 he denies having "slept on the job" and poses the somewhat rhetorical (but nonetheless compelling) question: "If I had actually been sleeping on the job why was I not fired, that would seem to be the reasonable thing to do." He does concede that he might have been in the camp but only so that he could obtain a meal prior to beginning a night shift. He denies ever having been accused of "sleeping on the job", or of having "padded his hours", by Mr. Kyle Moore or by anyone else.

The Director's delegate

13. In his September 20th submission the delegate detailed the various unsuccessful efforts he made to contact the employer during the initial phase of his investigation. Eventually, he contacted Inshalla's bookkeeper who indicated that she "was related to the family" and that she would convey information to and from Ms. Sindia—the bookkeeper refused to provide a contact number or address for Ms. Sindia. It is perhaps important to stress that during this time frame Ms. Sindia was, no doubt, under significant stress since her husband had recently been murdered and she was pregnant. The delegate indicated that in light of those extraordinary circumstances, and since the bookkeeper had the company's payroll records, he "decided to accept the bookkeeper's word that she would be communicating with the employer".

14. The payroll records that were provided corroborated Mr. Janveaux's complaint as to the days worked and the only real issue raised by the bookkeeper during the investigation was with respect to the matter of a daily 30-minute break—an issue that was ultimately resolved in favour of the employer.

FINDINGS AND ANALYSIS

Is an oral appeal hearing required?

15. As noted above, I am not satisfied that an oral appeal hearing should be held in this case. Ms. Sindia says that an oral hearing is required because "someone other than myself spoke on my behalf" during the investigation. However, this failing (if one can so characterized the situation) has now been remedied since Ms. Sindia has been given a full and fair opportunity to speak on her own behalf before the Tribunal. Further, the proposed "new evidence" that Ms. Sindia has tendered is both inadmissible and

rather unreliable. Accordingly, there would be no point to an oral hearing since it would only allow the parties to make their submissions on the record orally, in addition to their previously filed written submissions. In my view, the parties can (and have) adequately set out their respective positions in their written submissions and there is no need for supplementation (more likely, replication) by way of an oral hearing.

The Natural Justice Issue

16. Section 77 of the *Act* applies if the Director conducts, as was the situation here, an investigation. In such circumstances the "person under investigation" (i.e., Inshalla, in this case) must be afforded a reasonable opportunity to respond to the allegations made against it. The delegate made several attempts to contact Inshalla and, ultimately, spoke with the firm's bookkeeper who, if not formally authorized, nonetheless, had the apparent authority to speak on behalf of the firm.

17. The bookkeeper provided actual payroll records and communicated Inshalla's position. Ms. Sindia is not correct in her assertion that the bookkeeper "tried to settle" the dispute—rather, the bookkeeper provided information that the delegate relied on in making an independent determination of the matter. Further, *on her own evidence*, Ms. Sindia acknowledges that she was aware of the wage dispute long before the Determination was ever issued and, indeed, told Mr. Janveaux. that "perhaps the best thing to do" was for him to "go the Labour Board [sic]"—in those circumstances, Ms. Sindia's conduct, at best, displayed a certain lack of diligence. Finally, I note there is no corroborating evidence from the bookkeeper to the effect that she (the bookkeeper) was not receiving instructions from Ms. Sindia. In the circumstances, I am not prepared to accept that the bookkeeper was acting without authority and, in effect, was fraudulently representing her authority to act on behalf of Inshalla.

New Evidence

18. The governing test for consideration of "new evidence" under section 112(1)(c) of the *Act* takes into account four factors, namely:

- the failure to present the evidence before the delegate must not have been traceable to a lack of due diligence;
- the evidence is relevant and relates to a material issue in dispute between the parties;
- the evidence is credible; and
- the evidence is highly probative, in the sense that if it had been presented to the delegate, he or she might well have come to a different conclusion from that set out in the Determination (see *Davies et al.*, B.C.E.S.T. Decision No. D171/03).

19. The proposed new evidence in this case concerns whether Mr. Janveaux was "sleeping on the job" (from which it would follow that the payroll records were inaccurate) and whether the payroll records, in any event, could be relied on since they were never "approved" by an Inshalla foreman.

20. In my view, Inshalla's proposed new evidence was clearly available at the time the Determination was being made and could have, with a greater degree of diligence on the part of Ms. Sindia and/or her bookkeeper, been presented to the delegate. Further, the evidence regarding Mr. Janveaux's "sleeping on

the job" is vague, somewhat lacking in credibility and is almost entirely hearsay. More importantly, this latter evidence conflicts with the employer's own payroll records. On this latter point, Inshalla now says that its own records ought to be ignored because they do not conform to some internal procedure regarding supervisory approval. However, the delegate was obliged to proceed with the best evidence available and, in my opinion, did not fall into error when he relied on the employer's own records as the principal foundation for his unpaid wage calculations—particularly, when the *only* point raised by Inshalla with respect to its payroll records concerned whether a 30-minute adjustment break ought to have been made for each recorded day of work.

21. Finally, I shall briefly address the other two points raised by the appellant in its appeal documents—section 88 interest and the administrative penalty.

22. First, section 88 interest is a mandatory obligation when an employer is determined to have failed to pay wages—this provision of the award cannot be set aside.

23. As for the $500 administrative penalty, in the circumstances, Inshalla has been treated leniently. In his Reasons, the delegate explained why he only issued a single penalty even though the employer contravened at least two separate and independent provisions of the *Act.* I am not at all satisfied that the delegate had the discretion to levy only one penalty. However, since this latter point is not an issue in these proceedings, I will only observe that I have no jurisdiction to waive the one penalty that was issued in this case in light of my confirmation of the delegate's finding that the employer failed to pay Mr. Janveaux all of his earned wages.

24. It follows from the foregoing comments that this appeal is dismissed.

ORDER

25. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$1,976.13** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal