

An appeal

- by -

Joseph Toland
("Toland" or "Employee")

- 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

ADJUDICATOR: Paul E. Love

FILE No.: 2003A/73

DATE OF DECISION: June 3, 2003

DECISION

OVERVIEW

This is an appeal by an employee, Joseph Toland (“Toland” or “Employee”), from a Determination dated February 17, 2003 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”). Following an assignment into bankruptcy by 325983 B.C. Ltd. carrying on business as Osburn Manufacturing Inc., the Trustee-in-Bankruptcy sold the assets to another company. The purchasing company hired, some but not all, of the employees of Osburn for the purposes of winding down the bankrupt employer, and shipping the assets to Quebec, where the purchasing company ordinarily carried on business. Mr. Toland was not rehired. The Delegate found that Mr. Toland was entitled to the sum of \$6796.03, consisting of compensation for length of service, vacation pay and interest, payable by the bankrupt employer. The Delegate found that the purchasing company was not connected to the bankrupt, and that the companies were not in common direction or control. The Delegate found that the assets were purchased for value, but that the value of the assets was less than the claims owing to secured creditors. The Delegate found that the purchasing company was not a successor employer, or a related employer pursuant to section 97 and 95 of the *Act*. The Employee filed an appeal form alleging an error in the facts, an error in interpreting the law, a different explanation of the facts, other facts that weren’t considered during the investigation, and alleged that he was denied an opportunity to respond to the investigation. The Employee provided no further submission.

It is incumbent on an appellant to identify the issues in an appeal, identify errors in the Determination, and provide evidence or argument which persuasively establishes an error. In this case, the appeal was so bereft of detail that I dismissed the appeal. The appellant failed to meet the burden of proof as set out in *R & K Logging Ltd., BCEST #D471/97*, *H.B. Kayson Ltd. (c.o.b. Guru Lucky Sweets), BCEST #D051/98*, *CanStock Information Services Corp., BCEST #D553/01*.

ISSUE:

Did the Employee identify any error in the Determination, warranting a review by the Tribunal?

FACTS

I decided this case after considering the notice of appeal filed by the Employee, the written submissions of the Delegate and the record provided by the Delegate.

Mr. Toland worked for 325983 B.C. Ltd. carrying on business as Osburn Manufacturing Inc. (the “Employer”) from May 1995 to November 28, 2002 as a welder. His rate of pay was \$15.75 per hour. The Employer made an assignment into bankruptcy on November 28, 2002, and Deloitte & Touch Inc. was appointed as the trustee-in-bankruptcy on November 28, 2002. Employees were advised by the trustee of the bankruptcy by the Trustee on November 28, 2002. Mr. Toland attended a meeting, along with some of the other former employees on November 29, 2002. Some of the employees were advised that they would with 9120-2879 Quebec Inc. (“Quebec Inc.” or “purchasing company”) to “wind down the operation”. Quebec Inc. purchased the assets of the Employer, and retained some but not all employees. Mr. Toland was not retained by the company. The anticipated date of closure was

approximately mid February 2003, with all the equipment, machinery and assets to be sent to Quebec Inc.'s facility in the province of Quebec.

The Delegate found that the Employer was liable for compensation for length of service in the amount of \$4,410.00, vacation pay of \$176.40, accrued annual vacation pay of \$2,209.63, for a total of \$6796.03. Mr. Toland filed his proof of claim with the Trustee in Bankruptcy. The Statement of Affairs issued by the Trustee indicated a total liability of \$5,766,152.78, total assets of \$2,242,926.00. The amount of the estate was insufficient to pay the claims of secured creditors. Mr. Toland, as a creditor of the employer, will not be paid the amounts owing by the Employer under the Determination.

The Delegate held that Quebec Inc. was not a related employer under section 95 of the *Act*, as there was no common direction or control. The Delegate accepted the submission of the Trustee that there was no association between the bankrupt company and the purchasing company. A company search conducted by the Delegate determined that there were no common directors, or common control of the purchasing company and the bankrupt company.

The Delegate held that Quebec Inc. was not a successor employer within the meaning of section 97 of the *Act*, as it purchased the assets from the Trustee. The Delegate relied on the Director's Employment Standards Act and Regulations Interpretation Guidelines Manual:

If the Trustee sells the business and the employees continue their employment, the employees' rights under the Act are extinguished and their employment is deemed not to be continuous and uninterrupted for the purposes of the Act. The purchaser of a bankrupt business is not liable for the unpaid wages owed prior to the date of bankruptcy.

The Delegate held that a sale after bankruptcy is conducted by the Trustee in accordance with the Bankruptcy and Insolvency Act, ("BIA") according to the mandatory distribution scheme set out in section 136 of the BIA. The sale transaction, occurring after the assignment into bankruptcy and appointment of the trustee, was not a transaction that was a fraudulent conveyance. The Delegate appears to have accepted the representations of the Trustee that the disposition of the assets to the purchasing company was "administered fairly, with an interest towards satisfying at least some of the debt of the bankrupt company".

The Employee filed a notice of appeal alleging an error in the facts, an error in interpreting the law, a different explanation of the facts, other facts that weren't considered during the investigation, and alleged that he was denied an opportunity to respond to the investigation. The Employee requested an oral hearing, and made some notes on the appeal form. The content of the notes are set out in the argument portion of this decision. The Employee did not file any materials or documents.

All parties were advised on March 4, 2003, by the Vice-Chair of the Tribunal that:

The Tribunal will assign an Adjudicator to decide this appeal. The Adjudicator may decide this appeal solely on written materials provided by the parties, or an oral hearing may be held. In a Decision, the Adjudicator may confirm, vary or cancel the Determination or refer it back to the Director.

On April 2, 2003, the Vice-Chair of the Tribunal transmitted a submission received from the Director of Employment Standards to the parties, and placed a deadline of April 16, 2003 for the receipt of response

submissions. On April 17, 2003, the Vice- Chair of the Tribunal issued a letter to the parties determining that the appeal would be decided by an Adjudicator based on written submissions of the parties.

Employee's Argument:

The notice of appeal contained the following notes:

See all pages and NOTE the dates. ESB did not do anything, as far as I am aware until I forced them to respond. I had to demand the Determination. They said that they felt that what I had had up to that date was sufficient. I no of no other employee who got a formal Determination. that effectively precludes them from even trying to make an appeal, Yes?

I am, at the sending of this package, awaiting other responses from Deloitte (they want to talk to me, I want it all in writing) and, from my last clarification letter to ESB (Lost Determination).

The Employee checked the box on the Appeal Form indicating that he was seeking an "other remedy". The remedy sought was not specified by the Employee.

The Employee requested an oral hearing explaining:

Complexity and possible failure of ESB to fulfill their Statutory obligation and Fiduciary obligations, as a minimum to me, and, as far as we can determine all employees. I am awaiting complete information.

The Employee placed an "x" mark by 3 passages in the Determination, which relate to the meeting that the Employee attended, at the request of the purchasing company, after the date of the bankruptcy.

Delegate's Argument:

Counsel for the Employment Standards Branch set out that the assets were sold by the Trustee to a competitor of the Employer following "at least" two appraisals to assess the value of the assets and the reasonableness of the offer. Quebec Inc. made offers of employment to some, but not all of the employees, for the purposes of winding down the Employer's operation, by mid February 2003. Counsel submitted that the appeal did not meet the burden on an appellant to show that the Determination was wrong and ought to be varied and cancelled: *R & K Logging Ltd.*, BCEST #D471/97, *H.B. Kayson Ltd. (c.o.b. Guru Lucky Sweets)*, BCEST #D051/98, *CanStock Information Services Corp.*, BCEST #D553/01. Counsel argues that the submission is so lacking in particulars regarding the errors alleged, that Toland has failed to meet the burden of proof on this appeal.

The Employer and Quebec Inc. did not file any submission in this proceeding.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employee, to demonstrate an error such that I should vary or cancel the Determination. I note that the Delegate provided a reasoned decision, which grappled with the factual issues in the case, particularly the insolvency of the Employer, the assignment into bankruptcy, the sale of the assets following the bankruptcy, and the hiring of some, but not all, the employees for the purposes of winding down the

insolvent or bankrupt employer. The Employee has failed to specify the errors of fact , errors of law and breaches of natural justice that he alleges with regard to the Determination.

In this case, the Employee's submission is so bereft of detail, that it is apparent that it raises no issue of error. The Employer has identified no evidence or argument which challenges the material points in the Determination, in any meaningful fashion. The Employee does not identify any errors in the Determination, in any meaningful way, so that I can proceed to a consideration of error in the Determination. The Employee has failed to meet the burden of proof as set out in *R & K Logging Ltd.*, *BCEST #D471/97*, *H.B. Kayson Ltd. (c.o.b. Guru Lucky Sweets)*, *BCEST #D051/98*, *CanStock Information Services Corp.*, *BCEST #D553/01*. An Adjudicator should not be required to "guess" at the issues raised by the parties. It is not the task of the Adjudicator to canvass all the evidence that was before the Delegate and re-weigh that evidence, where an appellant fails to develop the issues, identify the errors, and seek to persuade the Adjudicator that the Delegate has erred. I therefore dismiss the appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated February 17, 2003 is confirmed, together with interest in accordance with section 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal