



An appeal

- by -

Jack's Towing Ltd.
("Jack's")

- 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: C.L. Roberts

FILE No.: 2005A/176

DATE OF DECISION: November 22, 2005

DECISION

SUBMISSIONS

Adele Burchart, Bryenton, Rosenberg & Company	on behalf of Jack's Towing Ltd.
Mary Walsh	on behalf of the Director of Employment Standards
Timothy Vieira	on his own behalf

OVERVIEW

1. This is an appeal by Jack's Towing Ltd. ("Jack's"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued August 19, 2005.
2. Timothy Vieira worked for Jack's, a towing business, primarily as a tow truck driver, although he also had some responsibilities for soliciting new customers. He worked from March 15, 2004 until January 17, 2005. On February 11, 2005, Mr. Vieira filed a complaint alleging that he was owed regular wages, overtime wages, statutory holiday pay, annual vacation pay and compensation for length of service.
3. The Director's delegate held a hearing into Mr. Vieira's complaint on May 27, 2005. Mr. Vieira appeared on his own behalf, no one appeared for Jack's.
4. The delegate determined that Jack's contravened Sections 18, 40 and 63 of the *Employment Standards Act* in failing to pay Mr. Vieira wages, overtime wages, vacation pay and compensation for length of service. She concluded that Mr. Vieira was entitled to a total of \$14,637.19, including interest. The delegate also imposed three \$500 penalties on Jack's for the contraventions, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. The delegate determined that Mr. Vieira was not entitled to statutory holiday pay.
6. Jack's argues that the delegate erred in law, and that evidence has become available that was not available at the time the Determination was being made. Although Jack's sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUES

1. Whether the delegate erred in law in:
 - a) finding that Mr. Vieira was
 - i) an employee rather than a self-employed contractor;
 - ii) entitled to a 3% bonus in the amount of \$7,000, overtime wages, vacation pay and compensation for length of service; and
 - b) imposing administrative penalties in the amount of \$1,500

2. Has new evidence become available that would support a conclusion that the Determination should be changed?

THE FACTS AND ARGUMENT

7. After Mr. Vieira filed his complaint, a delegate of the Director scheduled a mediation session with Jack's and Mr. Vieira for April 1, 2005. Glenn Slusar, who is an Officer/Director of Jack's and the person responsible for Mr. Vieira's employment, advised the delegate that he would not be attending. The delegate set a May 27, 2005 date for the hearing of the complaint, and issued a Demand for Employer Records.
8. In a letter to the Director dated May 4, 2005, Mr. Slusar expressed the view that Mr. Vieira was an independent contractor, and that Mr. Vieira had breached the contract. He also indicated that he wished to delay any investigation or hearing into Mr. Vieira's complaint until Revenue Canada had ruled on a similar complaint. The delegate who was assigned to hear the complaint denied Jack's an adjournment request as she did not consider it to constitute extraordinary circumstances.
9. In a letter dated May 24, 2005, Mr. Slusar acknowledged the Director's denial of the adjournment application, and indicated that he would be unable to attend the hearing. He indicated that Mr. Vieira had, at no time, requested any payroll deductions (including EI and CPP) be taken, and referred to a Personal Services Contract, which he included with the letter. Mr. Slusar further acknowledged that, in the event the delegate found Mr. Vieira to be an employee, he was prepared to order his payroll company to pay him statutory and holiday pay, and remit payroll deductions. Mr. Slusar expressed the view that he had just cause to terminate Mr. Vieira's contract because, in essence, he did not feel Mr. Vieira was performing satisfactorily. Mr. Slusar concluded his letter with the following: "Please mail me your decision..." Enclosed with the letter was a "Personal Service Contract" on Jack's letterhead. The document set out terms and conditions, some of which are as follows:
 - a) sales vehicle supplied by Jack's Towing Ltd. includes license, insurance, fuel and maintenance to be used for company business ...
 - b) Mike cellular phone supplied for business use only
 - c) Expense account limited to...
 - d) Extended medical and dental for Tim Vieira and spouse paid by Jack's Towing Ltd.
 - e) Compensation: \$200 per day (approx \$52,000 per year) to be paid in full bi-monthly plus 3% of Gross Sales of Jack's Towing Heavy Division to be paid by lump sum at the end of the year.

Duties

1. To call on customers and potential customers as necessary to hand out business cards/promotional material. A written detailed record documenting each sales call must be kept (forms supplied).
2. To train ... to operate tandem tow truck
3. Be on call Monday to Friday...
4. Wear company uniforms supplied by Jack's... while on duty... and to abide by Jack's ... company policy.

10. When the hearing commenced on May 27th, the delegate was satisfied that Mr. Slusar was aware of the date and time of the hearing. She noted that a Notice of hearing had been delivered to Jack's place of business on April 6, 2005, and that Mr. Slusar had been notified by both telephone and a May 19, 2005 fax that his adjournment request had been denied. She also noted Mr. Slusar's May 24, 2005 letter indicated he would not be attending the hearing. The Determination notes that an Employment Standards Branch officer contacted Mr. Slusar to advise him that the hearing was proceeding, and offered him the opportunity to appear by telephone or to arrange for another company representative to appear, both options of which were refused.
11. The delegate considered Mr. Vieira's assertion that he was an employee and Jack's submissions, including the "Personal Services Contract" on that issue. The delegate considered the definitions of employee and employer contained in the Act as well as the common law tests and determined that Mr. Vieira was an employee. She determined that Jack directed and controlled Mr. Vieira's work activities, set his hours of work, required him to submit expenses for approval, provided him with an expense account, and subjected him to company policies which included personal conduct, absenteeism and equipment use. She also noted that Jack had the authority to discipline Mr. Vieira, provided him with tools to perform his duties, including trucks, stationary, business cards, a uniform and expense accounts. She concluded that Mr. Vieira had no chance of profit or risk of loss, and that Jack had provided no evidence that Mr. Vieira was in business for himself. Finally, she determined that Mr. Vieira's work was an integral part of Jack's operation, and was hired for providing services over a lengthy period of time. She noted that an employer's failure to withhold statutory deductions did not mean that the nature of the relationship was one of an independent contractor. The delegate concluded that Mr. Vieira was an employee.
12. The delegate then considered Mr. Vieira's claim for wages, specifically, his claim for 3% of the Heavy Division gross sales. Mr. Vieira's evidence was that this amount was equal to approximately \$7,000. Mr. Vieira acknowledged at the hearing that he had no records confirming the amount of the heavy division sales, but contended that he was responsible for obtaining one account which would have resulted in revenue of \$140,000, and that he was responsible for \$60,000 towing charges. The delegate found that Jack had failed to pay Mr. Vieira 3% commission wages pursuant to the contract. In the absence of any evidence from Jack as to the wages Mr. Vieira was entitled, she accepted Mr. Vieira's evidence to be an accurate reflection of the wages he was owed:

While Vieira has the burden of proving his claim on a balance of probabilities, I find that his inability to provide a record of revenue or sales made or to provide oral testimony as to a precise figure is not fatal to his claim.
13. After citing Tribunal decisions supporting this conclusion, the delegate determined that the \$7,000 claim was fair and reasonable even though it might not have been 100% mathematically correct.
14. The delegate further found that Mr. Vieira was entitled to overtime. She noted that, although Mr. Slusar contended that Mr. Vieira did not work 6 am to 6 pm Monday to Friday, he failed to provide records to support this contention.
15. The delegate further found that Mr. Vieira was entitled to 4% vacation pay on his gross wages for the entire period of his employment.
16. Finally, the delegate found that Jack had not discharged the burden of substantiating that Mr. Vieira's employment had been terminated for just cause. She accepted Mr. Vieira's evidence that he had not been

warned about his job performance, or that his position was at risk, and concluded that he was entitled to compensation for length of service.

17. Counsel for Jack's submits that Mr. Slusar believed that the Personal Service Contract "spoke for itself", and that he had understood from discussions with Christie Macdonald, a delegate of the Director, that the only issue to be determined at the hearing was whether Mr. Vieira was an independent contractor or an employee. She submits that Mr. Slusar understood that, after this issue was determined, he would have the opportunity to respond to the other issues. She submits that he also believed that a ruling by Canada Revenue on the issue of whether Mr. Vieira was an independent contractor or an employee would be determinative of the issue. Counsel for Jack's enclosed the "new evidence" consisting of a summary of actual time worked and gross sales of Jack's Towing Heavy Division, copies of Mr. Vieira's call cards, and a copy of the activity and expense sheets submitted by Mr. Vieira. Jack's counsel set out what was asserted to be Mr. Slusar's evidence on the issues of wages, overtime, vacation pay and compensation for length of service.
18. Jack's counsel further submits that the delegate erred in finding Mr. Vieira an independent contractor, and outlined the evidence Mr. Slusar would have given on that issue had he appeared at the hearing. Counsel further submits that the delegate erred in law in finding that Mr. Vieira was entitled to wages, overtime, vacation pay and compensation for length of service. Finally, counsel also submits that the delegate erred in imposing administrative penalties on the basis that Mr. Slusar acted "in good faith", and that there was a single set of circumstances that should not have led to a finding of multiple contraventions.
19. The delegate argues that Jack's has failed to provide sufficient grounds to substantiate the grounds of appeal. The delegate submits that Mr. Slusar had every opportunity to know the case against him and to respond to the allegations. She submits that all of the hearing material identified the issue at the hearing as Mr. Vieira's complaint under the *Act*, without any restriction as to the issues. She also says that, not only did Mr. Slusar know about the hearing and the issues to be addressed, Mr. Slusar had multiple sources of information which he could access if he wished, given that Employment Standards Factsheets and the Branch's information line telephone number were also included with the hearing information.
20. Attached to the delegate's submission is an affidavit from Ms. Macdonald, the hearing officer referred to by Mr. Slusar in the submissions. The delegate denies that Mr. Slusar was misled as to the nature and consequences of the hearing, and contends that Mr. Slusar's misunderstanding is not a basis for appeal. She submits that Mr. Slusar's failure to provide the information at first instance falls within the principles enunciated by the Tribunal in *Tri-West Tractor Ltd.* (BC EST #D268/96)
21. The delegate further submits that Jack's has not demonstrated an error of law; rather, that Jack's submissions relate to the possibility that a different conclusion might result if additional evidence was considered. The delegate submits that the "new evidence" does not meet the test for admission of new evidence set out in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, (BC EST #D 171/03). The delegate also contends that much of the "new evidence" Jack's seeks to rely on falls squarely within the records stipulated in the Demand for Employer Records, sent to Jack's on April 5, 2005. The delegate submits that, even had Mr. Slusar did not understand that the hearing would be addressing all issues, the Demand ought to have alerted him to the need to submit all information that was the subject of the Demand, or made inquiries to the Branch as to what was required. The delegate says that Jack's failed to demonstrate due diligence, and his failure is not a ground for appeal.

22. The delegate relies on the Tribunal's decision in *Kimberley Dawn Kopchuk* (BC EST #D049/05, #D 114/05) for authority in assessing the administrative penalties, and says that, in any event, good faith is not a basis for a penalty exemption.
23. Mr. Vieira submits that Mr. Slusar was aware of the nature and consequences of the hearing, and that the appeal should be dismissed. Although Mr. Vieira also responded to some of Mr. Slusar's submissions, those responses will not be set out here for the reasons that follow.
24. In a reply submission, counsel for Jack's contends that Ms. Macdonald's affidavit does not refute Mr. Slusar's assertions, that Ms. Macdonald's recollection and records are mistaken, and that, in the interest of justice and fairness, the employer should be given an opportunity to respond to the issue of whether wages were owing.

ANALYSIS AND DECISION

25. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- a) the director erred in law
 - b) the director failed to observe the principles of natural justice in making the determination; or
 - c) evidence has become available that was not available at the time the determination was being made
26. The burden of establishing the grounds for an appeal rests with an Appellant. Jack's must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged. Although Jack's counsel has characterized the second ground of appeal as one of new evidence, in essence, it is one of a denial of natural justice, which an appellant also has the burden of establishing.
27. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- 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;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - 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.
28. Counsel's submission sets out "facts" Mr. Slusar would have testified to had he been at the hearing. Included with the appeal submission are a number of documents that counsel submits would have led the delegate to a different conclusion on the material issues. I note at this point that Mr. Slusar's assertions are not facts. Facts are found by the delegate after the parties give evidence under oath, that evidence is

tested in cross examination, and the delegate makes an assessment of the parties' credibility. Until that has occurred, Mr. Slusar's assertions are simply that – assertions. Whatever assertions Mr. Slusar is now making through his counsel, could, and should, have been made to the delegate at the hearing, along with the documentary evidence.

29. The Tribunal has consistently said that it will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative or hearing process. In *Tri-West Tractor Ltd.* (BC EST #D268/96), the Tribunal held that it would not allow appellants to “sit in the weeds”, failing or refusing to cooperate with the delegate during an investigation and then later file appeal of the Determination when they disagreed with it. The assertions and documents do not meet the test for the admission of new evidence.

30. However, Mr. Slusar makes another allegation that must be addressed. He contends that that the reason this evidence was not presented at the hearing is because Ms. Macdonald misled him into believing that the sole issue to be determined at the May 27, 2005 hearing was whether Mr. Vieira was an independent contractor or an employee, and that he relied on assurances made to him by Ms. Macdonald that he would be given the opportunity to present additional evidence on the issues of wages at a later date.

31. That allegation raises an issue of natural justice – that is, was Mr. Slusar misled by Branch officials prior to the hearing about what issues were to be decided.

32. In *D'Hondt's Farms* (BC EST #RD021/25), the Tribunal stated:

A finding that the Branch has breached natural justice through representations or assurances that were reasonably relied upon and misled a party is a serious matter. While sworn evidence is not necessarily required, clear and reliable first party evidence is required.

The onus of proof to demonstrate a breach of natural justice is on the Appellant. In *J.C. Creations Ltd.*, BCEST #RD317/03 the Tribunal was provided with a statutory declaration from the employer outlining the specifics of the breach of natural justice alleged. In contrast, the information before us here consists of second-hand information from Mr. D'Hondt and latterly from legal counsel in a letter.

33. As noted above, an allegation that the Branch misled Mr. Slusar to his detriment is a serious matter, one that is not to be made frivolously or speculatively, and must have a strong evidentiary foundation. Neither Mr. Slusar nor any other representative from Jack's provided any direct, reliable first party evidence as to what they were told. As in *D'Hondt's Farms*, Mr. Slusar's allegations are made by way of submissions through counsel. The Branch's response consists of an affidavit from Ms. Macdonald. In her affidavit, Ms. Macdonald deposes, among other things, the following:

- a) that she was appointed to conduct the mediation session between Jack's and Mr. Vieira, and that, on April 1, 2005, she was contacted by a man identifying himself as Mr. Slusar, who informed her that he would not be attending the mediation session;
- b) that she attempted to speak with Mr. Slusar on May 9, 11, 17, 18 and 19, 2005 to advise him that the delegate appointed to conduct the hearing had denied his request for an adjournment. Although she left messages with the person answering the telephone for Mr. Slusar to call her, he did not return any of those calls.

- c) that on May 19, 2005, she faxed Jack's a letter indicating that the adjournment request had been denied, and telephoned Jack's to confirm that the fax had been received.
- d) that on May 27, 2005, the date of the hearing, a female identifying herself as an employee of Jack's handed her a sealed envelope containing a letter dated May 24, 2005. She was able to speak to Mr. Slusar at his cellular telephone number, and advised him that the hearing was occurring, and asked him whether he could attend in person or by telephone.
- e) according to her notes of that conversation, which are attached as exhibits to her affidavit, Mr. Slusar said that he was too busy to attend the hearing, that she advised him that his letter would be given less weight than his testimony, and that he replied that "his letter contained the facts" and "he [was] not trying to hide anything". She explained the penalty provisions to him, and Mr. Slusar indicated he couldn't spend any time on "this" as he had other employees to look after.
- f) that at no time did she tell Mr. Slusar that the sole issue to be decided was whether Mr. Vieira was an employee or an independent contractor, or that he would be given the opportunity to respond to, and provide other records or evidence on, the issues of wages, overtime, statutory holiday pay, vacation pay and compensation for length of service once the issue of whether he was a contractor or employee had been determined.

34. While Mr. Slusar may well have misunderstood the nature and consequences of the hearing, I am unable to find that this misunderstanding was a result of any conversation he had with Branch employees, or arose out of any of the documents provided to him. Mr. Vieira's complaint form clearly sets out his claim for wages. Mr. Slusar failed or refused to attend the mediation hearing at which he would have been entitled to canvass the issues. Nothing in the Branch's correspondence restricted the issues. The Director issued a Demand for Employer Records which ought to have alerted Mr. Slusar to the fact that wages would be in issue. There is no evidence Mr. Slusar attempted to confirm or clarify his understanding of the proceedings or the issues before the delegate. Mr. Slusar's May 24, 2005 letter contains submissions on the issue of the employment relationship, and states: "If your decision is to treat Mr. Vieira as an employee I am prepared to order our payroll company to pay him...." The letter also sets out Mr. Slusar's reasons for terminating Mr. Vieira's employment. Mr. Slusar refused or failed to appear at the hearing, even when he was provided with the opportunity to participate by telephone. The record suggests that Mr. Slusar demonstrated little interest in the proceedings until the Determination was issued.

35. In summary, I find that Jack's has failed to discharge its evidentiary burden of establishing that it was denied a fair hearing and deny the appeal on this basis.

36. Jack's counsel also argues that the delegate erred in law in concluding that Mr. Vieira was an employee, and awarding him wages and compensation for length of service. As noted above, the burden is on an appellant to provide persuasive and compelling evidence that there was such an error. Jack's counsel does not say how the delegate erred in law, arguing that, had the delegate had the benefit of Mr. Slusar's "facts", she would have arrived at a different conclusion. I note that, although Mr. Slusar acknowledged that he was aware the delegate would be making a determination on the issue of whether Mr. Vieira was an employee or an independent contractor, he nevertheless argues that there is new evidence that would have led the delegate to a different conclusion on that issue. For the reasons set out above, I find that Mr. Slusar had full opportunity to respond to the complaint and failed to do so. Jack's cannot use the appeal process to make a case it should have advanced before the delegate at first instance.

37. Notwithstanding the absence of any evidence that the delegate erred, I have nevertheless reviewed the delegate's analysis of the facts and the law in concluding that Mr. Vieira was an employee rather than an independent contractor. This issue was recently considered by the Tribunal in *Jane Welch operating as Windy Willows Farm* (BC EST #D161/05):

Whether a person is an employee or an independent contractor depends on the application of a legal standard to a set of facts, and is thus a question of mixed fact and law: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 S.C.C. 33, at para. 37. However, the question of whether the correct legal standard has been applied is a question of law.

The Tribunal has adopted the following the following factors, set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (C.A.), defining the types of errors of law which are reviewable by the Tribunal under s. 112:

- (1) A misinterpretation or misapplication of a section of the Act;
- (2) A misapplication of an applicable principle of general law;
- (3) Acting without any evidence;
- (4) Acting on a view of the facts which could not reasonably be entertained; and
- (5) Exercising discretion in a fashion that is wrong in principle.

See *J.C. Creations Ltd. (c.o.b.) Heavenly Bodies Sport*, BC EST #RD317/03.

This formulation of what constitutes an error of law was developed in the context of the Assessment Act, R.S.B.C. 1996, c. 20, which permits appeals to the Supreme Court of British Columbia from decisions of the Property Assessment Board in the form of a stated case on questions of law.

In *Britco Structures Ltd.*, BC EST #D260/03 the Tribunal considered the application of the Gemex test to issues of mixed fact and law, in light of subsequent decisions, both of the Supreme Court of Canada and of British Columbia courts in statutory appeals under the Assessment Act. The Tribunal stated the issue in the following manner:

It is clear from s. 112 of the Act that a question of fact, alone, is not within this Tribunal's jurisdiction. The following question appears to me to remain: to what extent, if at all, can a question of mixed law and fact fall within the Tribunal's jurisdiction as being an error of law; and in what circumstances, if a at all, can a question of fact be characterized as a question of law?

On this issue, the Tribunal concluded that "the definition of error of law in Gemex ought not to be applied so broadly as to include errors which are not in fact errors of law, such as errors of fact, alone, or errors of mixed law and fact which do not contain extricable errors of law." However, the Tribunal held that findings of fact were still reviewable as errors of law according to prongs (3) and (4) of the Gemex test above: that is, if they are based on no evidence, or on a view of the facts which could not reasonably be entertained. The Tribunal noted that the test for establishing an error of law on this basis is stringent, citing Mr. Justice Hood's reformulation of the third and fourth Gemex factors in *Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11-Richmond/Delta)*, [2000] B.C.J. No. 331 (S.C.) at para. 18, namely:

...that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could"...

38. The only evidence before the delegate was Mr. Vieira's oral evidence, Mr. Slusar's letter and the documents supplied by Mr. Slusar. She considered the evidence, made findings of fact, applied the *Act* and common law to those facts, and arrived at a reasoned decision. Having reviewed the evidence and the submissions, I am unable to conclude that the delegate erred in her conclusion.
39. Jack's also contends that the delegate erred in law in concluding that Mr. Vieira was entitled to compensation for length of service. Mr. Slusar also made submissions on this issue in his May 24, 2005 letter. Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause. There was no evidence before the delegate that Jack's had cause to terminate Mr. Vieira's employment. There is also none on appeal. I am unable to find that the delegate erred in law in this respect.
40. After a review of the appeal submissions on the issue of other wages owing, I find no grounds to interfere with the Determination. Jack's has not demonstrated that the delegate erred in law, and I deny the appeal on this ground.
41. Administrative penalties have been considered in a number of Tribunal decisions, including *Maranara Management Services Ltd. operating as Brother's Restaurant* (BC EST #D160/04) and *Kimberly Dawn Kopchuk* (BC EST #D049/05). Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. In *Acton Super-Save Gas Stations Ltd.* (BC EST #D067/04) the Tribunal concluded that the Act provides for mandatory administrative penalties without any exceptions: "The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme." I am unable to find that the delegate erred in law in assessing administrative penalties in the total amount of \$1500.
42. The appeal is denied.

ORDER

43. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated August 19, 2005, be confirmed in the amount of \$16,137.19, plus whatever interest might have accrued since the date of issuance.

C.L. Roberts
Member
Employment Standards Tribunal