

An appeal

- by -

Hemlock Valley Resorts Inc.
("Hemlock Valley")

- 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: David B. Stevenson

FILE No.: 2003A/83

DATE OF DECISION: June 9, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Hemlock Valley Resorts Inc. (“Hemlock Valley”) of a Determination that was issued on February 4, 2003 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Hemlock Valley had contravened the *Act* in respect of the employment of James Dakin (“Dakin”) and ordered Hemlock Valley to cease contravening and to comply with the *Act* and to pay an amount of \$8,186.73.

Hemlock Valley has filed an appeal on the grounds that the Director failed to observe principles of natural justice in making the Determination and that evidence has come available that was not available at the time the Determination was made.

The appeal requests an oral hearing. There is, however, nothing in the appeal that indicates an oral hearing is necessary and the Tribunal has decided the appeal can be properly addressed through written submissions.

ISSUE

There are two issues raised in this appeal. The first issue is whether Dakin was a manager for the purposes of the *Act* and the second is whether, even if Dakin was not a manager, the Director erred in determining Dakin was owed wages or, if he was owed wages, in calculating the amount of wages owed.

FACTS

The basic facts are not in dispute. Dakin was employed by Hemlock Valley, doing equipment repair, from December 27, 2001 to March 11, 2002. He was paid a rate of \$22.00 an hour. On termination, Dakin complained, among other things, that he had not been paid overtime.

The Director investigated the complaint. Dakin provided a record of the hours he worked.

Hemlock Valley also provided a record of hours worked by Dakin and wages paid to him.

The Director accepted the record of hours provided by Dakin as being more accurate and stated three reasons in the Determination for that result:

1. they [Hemlock Valley’s records] did not capture the meeting between the Aerial Tramway Inspector and the complainant. I preferred the evidence of the Inspector to the employee who claimed the complainant started later in the day.
2. they [Hemlock Valley’s records] initially paid the complainant at straight time for the hours he claimed.
3. Despite numerous messages left over a period of months for the employer’s management staff, asking for evidence to substantiate its record of hours (for example the name of the bartender who

claimed the complainant was drinking while claiming to be working) the employer refused to contact me.

In respect of the second point, the Determination contained the following statement:

Based on these records the complainant was overpaid. When I asked why the employer paid more than its own record of hours indicated, I was told that they had paid straight time based on the complainant's records in order to keep him from quitting during the busy ski season. These instructions were given to payroll staff by the complainant's immediate supervisor.

In this appeal, Hemlock Valley does not dispute the above statement.

In respect of the third point, the record does suggest Hemlock Valley was not being particularly responsive to the Director's demands for information to support material provided and assertions of fact made by them. In a letter to Hemlock Valley dated December 5, 2002, the Director stated:

This inconsistency, combined with the employer's apparent refusal to provide any additional evidence to support its case. leads me to draw an adverse inference on the employer's record of hours.

Following that letter, Hemlock Valley did prepare and provide statements to the Director from Darrin Schmitz, Terrain Parks and Special Events Director, and Adriane Meister, a former lift maintenance supervisor for Hemlock Valley. As well, Jamie Cox, who represented Hemlock Valley during the investigation, relayed the substance of a discussion he had in late December 2002 or early January 2003 with the Aerial Tram Inspector. None of that information appears to have altered the Director's view of the relative validity of respective parties' records.

Additional material has been provided with the appeal that was not given to the Director during the investigation.

ARGUMENT AND ANALYSIS

Subsection 112(1) of the *Act* sets out the grounds for appeal to the Tribunal:

- 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 made.*

The burden is on Hemlock Valley to show an error in the Determination. An appeal to the Tribunal is not a re-investigation of the complaint nor is it simply an opportunity to re-argue positions taken during the investigation or fill in perceived evidentiary gaps. Hemlock Valley has indicated their appeal is grounded, in part, on fresh evidence becoming available that was not available at the time of the Determination (see paragraph 112(1)(c) of the *Act*). The Tribunal has noted, in *Bruce Davies and others*,

Directors or Officers of Merilus Technologies Inc., BC EST #D171/03, that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. Fresh evidence which an appellant seeks to submit with an appeal will be tested against the following criteria:

- (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 could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

It is apparent that all of the fresh evidence submitted with this appeal was either known to Hemlock Valley before the Determination was issued or could have, with the exercise of due diligence, been discovered and presented to the Director. As well, while the material has some relevance to the issue of the hours worked by Dakin, I do not consider it as being particularly probative on that issue. Accordingly, the fresh evidence, which includes two inspection reports, the statements from the two bartenders and the telephone bills, will not be admitted or considered in this appeal.

The appeal raises the status of Dakin under the *Act*. The submission of Hemlock Valley on this part of the appeal states:

I recall that the complainant stated to me that he was hired as the Operations Manager and this was reminded to me from staff making statement [sic] that this was the role that the complainant expressed a number of times. With this in mind and with reference to the BC Labour Code and exclusion from Parts 4 & 5 of the Employment Standards Act in a position of manager. Then in fact I can appeal on the grounds that the complainant was excluded from receiving overtime as well as on the fact the hours were false.

The above statement is inconsistent with a statement made by Hemlock Valley in the initial reply on the complaint to the Director in June 2002, where it was stated:

Hemlock Valley Resort hired Mr. James Dakin on December 27, 2001 in the position of a mechanic, by Mr. Scat Peterson.

In reply to this part of the appeal, Dakin says he was hired, and worked, as a mechanic. The Director, in reply, notes the assertion that Dakin was a manager under the *Act* was never raised during the investigation, but that in any event Dakin's primary duties did not involve the direction and supervision of employees.

There is nothing in the record that supports a conclusion that Dakin should be found to be a manager for the purposes of the *Act* and this part of the appeal is dismissed.

On the question of whether the Director erred in concluding Dakin was owed wages and in calculating the amount of wages owed from his records, I agree with the submission of the Director that, notwithstanding the appeal is grounded in an allegation the Director failed to observe principles of natural justice in

making the decision, the appeal is essentially a challenge to findings of facts and to inferences based on findings of facts. While it is apparent Hemlock Valley disagrees with the findings made by the Director, they have failed to show any error in those findings that would justify the Tribunal interfering with the Determination.

This part of the appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 4, 2003 be confirmed in the amount of \$8,186.73, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal