

An appeal

- by -

Digits Information Technology Services Ltd.

- 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: Carol Ann Hart

FILE No.: 2005A/157

DATE OF DECISION: December 22, 2005

DECISION

SUBMISSIONS

Teresa Palmer on behalf of Digits Information Technology Services Ltd.
Ed Wall on behalf of the Director

OVERVIEW

1. This is an appeal by Digits Information Technology Services Ltd. (“Digits”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued on July 11, 2005 (the “Determination”) by a delegate of the Director of Employment Standards (the “Director”).
2. In the Determination, the delegate for the Director determined that Digits had contravened the *Act* and ordered that the employer pay wages, annual vacation pay, the amount of cheques which had not cleared the Bank, compensation for length of service, and interest.
3. The delegate for the Director further ordered that three administrative penalties of \$500 each be paid by Digits for three contraventions of the *Act* and the *Regulations*. The delegate assessed the penalties with respect to contraventions of sections 17 (failure to pay wages) and 58 (failure to pay vacation pay) of the *Act*; and section 46 of the *Employment Standards Regulation* (failure to produce records).
4. This appeal is brought on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
5. Although the appellants requested an oral hearing, the Tribunal has concluded that the issues raised in this appeal may be properly addressed through written submissions.

ISSUES

6. The following issues must be determined in this case:
 1. Did the delegate for the Director fail to observe the principles of natural justice in making the Determination?
 2. Did the delegate for the Director err in law in making the Determination?

BACKGROUND

7. Digits is a small company which provides retail business services including printing, photocopying, stationery sales, computer sales and service, web design, fax and internet services, and DVD rentals.
8. Gordon Wilson worked for Digits from September 15, 2003 until his employment was terminated on July 2, 2004.

9. Mr. Wilson filed a complaint with the Employment Standards Branch alleging that his employment was terminated without just cause. He maintained that Digits had contravened the *Act* by failing to pay annual vacation pay, statutory holiday pay, compensation for length of service, and wages for the period from June 24 to July 2, 2004; and by failing to reimburse him for NSF cheques.
10. In the Determination, the delegate for the Director decided that Digits had not established that there was just cause for the termination of Mr. Wilson.
11. The nature of Mr. Wilson's position with Digits was also in dispute. Mr. Wilson maintained that he was a computer technician, and not a manager. The employer's position was that Mr. Wilson was a manager. The delegate for the Director concluded in the Determination that Mr. Wilson was a manager, as defined in the *Act*. The decision that Mr. Wilson was a manager has not been appealed.

SUBMISSIONS

Appellants' Submissions

- There was no legal basis for the decision of the delegate for the Director regarding pay advances. Although the appellants acknowledged that they had not properly documented the pay advances, they submitted that Mr. Wilson was paid all of the amounts he was owed plus additional funds in advances paid both by cheque and cash.

Cheque number 0576 was replaced by cash. Cheque number 0563 had never been issued to Mr. Wilson. Digits should not have to replace a cheque it had never issued.

Cheques were written to Mr. Wilson for wages and non-competition agreement payments only. All other payments issued were made in the form of cash paid to Mr. Wilson, or direct deposit to his bank account. Payments to telephone service and insurance providers were made directly.

- The delegate for the Director was incorrect in deciding that there was not just cause for Mr. Wilson's termination. The delegate had not properly considered the combined reasons for his dismissal, and had overlooked important facts.

The employment of Mr. Wilson was terminated for on-going workplace violence. He had been warned repeatedly to control his temper. The final incident of violence in the workplace had taken place on July 2, 2005.

Ms. Palmer wrote that there were additional reasons for Mr. Wilson's termination. He had engaged in a "personal/sexual relationship" with a fifteen year old employee, whom he supervised; and Digits believed that Mr. Wilson's behaviour demonstrated that he was using drugs.

- The statement of Vina Benn was not provided to the appellants for their reply. According to the appellants, Ms. Benn had advised that she had not written any letter or statement on behalf of Mr. Wilson.

Director's Submissions

- The appellants had submitted that cheque No. 0576 had been replaced with cash, and other cheques (Nos. 551, 556, 560) should be considered as wages. Digits had issued cheques to Mr. Wilson for a number of reasons including non-competition agreement payments, reimbursement for travel expenses, truck insurance, cell phone charges and a truck loan payment. The delegate submitted that the appellants had failed to provide payroll documentation which could link the cheques in question to a specific pay period.

The appellants maintained that they had never issued cheque No. 0563, and submitted that the amount of the cheque should cover the pay period from June 24 to July 2, 2004. The delegate for the Director argued that it was unlikely that Digits would have paid Mr. Wilson more than one month in advance without knowing how many hours he would work during that pay period. Furthermore, there was no payroll documentation to link the cheque to the pay period in question.

The appellants had argued that amounts of various cheques should be used to offset wages earned in other pay periods. Such a determination would be a contravention of section 17 of the *Act*, which required that all wages earned in a pay period be paid within eight days of the end of the pay period. The record-keeping of Digits was not in accordance with the policy of the Employment Standards Branch regarding pay advances.

- On appeal, the appellants sought to raise new allegations (that Mr. Wilson was using drugs and had an improper relationship with an employee) to support their assertion that Mr. Wilson was terminated for just cause. The delegate submitted that because these allegations had not been raised during the investigation process, they should not be considered on appeal. Furthermore, these allegations were not supported with evidence.

The allegation that workplace violence had occurred was not proved on a balance of probabilities by Digits for the reasons provided in the Determination.

- Vina Benn's statement had no probative value, as it pertained to the issue as to whether Mr. Wilson was a manager. Ms. Benn's evidence supported the assertion originally made by Mr. Wilson that he was not a manager. The determination that Mr. Wilson was a manager had not been appealed. Consequently, nothing turned on Ms. Benn's statement.

ANALYSIS

- ^{12.} Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision reads as follows:

- 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 being made.*

Natural Justice

13. Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the delegates for the Director are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. The parties are entitled to procedural fairness, and they must be given the opportunity to respond to the evidence and arguments presented by the adverse party. (see *BWI Business World Incorporated* BC EST #D050/96).
14. The burden rests with the party alleging an error of natural justice, to demonstrate that error.
15. The only issue raised by the appellants which appears to relate to a denial of natural justice is the allegation that Digits was not given the opportunity to review and respond to a statement of Vina Benn. There is no mention of Ms. Benn's evidence in the Determination. According to the delegate for the Director, the information provided by Ms. Benn made no difference in the outcome of the Determination. Ms. Benn's evidence supported the contention of Mr. Wilson that he was not a manager, and this argument had not been accepted.
16. The information provided by Vina Benn was not accorded any weight, and the delegate for the Director decided that Mr. Wilson *was* a manager. For this reason, I cannot conclude that there was a breach of the principles of natural justice which had any impact on the findings in the Determination, or which could affect the outcome of this appeal.

Error of Law

17. In a number of previous decisions, the Tribunal has adopted the definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.). That definition can be paraphrased as finding an error of law where there is:
 1. a misinterpretation or misapplication of a section of a statute;
 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. adopting a methodology that is wrong in principle.
18. In some situations, errors on findings of fact may amount to error of law. In that context, however, the appellant must show either there was no evidence to support the findings of fact made, or that a view of the facts was taken by the Director that could not reasonably be entertained based on the evidence that was before the Director (see *Jane Welsh, Operating as Windy Willows Farms*, BC EST #D161/05).
19. The delegate for the Director considered all of the evidence surrounding the allegation that there was just cause for Mr. Wilson's termination on the basis of workplace violence. It was correctly outlined by the delegate that physical violence in the workplace against the employer would amount to just cause for

termination. However, the delegate found that the evidence of the parties concerning what had occurred on July 2, 2005 was contradictory, and Digits had failed to establish that there was just cause for the termination of Mr. Wilson based on the civil standard of proof, the balance of probabilities.

20. Digits raised two new arguments on appeal to support the contention that there was just cause for the termination of Mr. Wilson's employment. There was nothing in the submissions provided by the appellants, the Determination, or the record to show that these allegations had been brought forward by the appellants during the investigation process. An appeal is not an opportunity to re-argue a case using new allegations which were not raised with the delegate for the Director during the investigation.
21. I turn now to the allegations concerning the pay advances, the cash payments, and the cheque which the appellants maintained was not issued by them. The appellants appear to be contending that the Director erred in the findings of fact made in the Determination. The Tribunal has no jurisdiction over questions of fact. (See *Britco Structures Ltd*, BC EST #D260/03).
22. I have no jurisdiction to re-weigh the evidence which was before the delegate for the Director simply because Digits asserts that the conclusions were incorrect. There must be persuasive evidence that the decision reached by the delegate was unsupported by the material before him.
23. The appellants have failed to provide sufficient evidence to establish that the delegate for the Director erred in law in making the Determination. I find that the conclusions reached by the delegate for the Director on the alleged pay advances, the cash payments, and the cheque which the appellants maintained was not issued by them, were supported by evidence on the record which was considered and weighed by the delegate. I cannot conclude the view of the facts taken by the delegate for the Director was one that could not be reasonably entertained from the evidence that was presented.

ORDER

24. I order, pursuant to Section 115 of the *Act*, that the Determination dated July 11, 2005 be confirmed.

Carol Ann Hart
Member
Employment Standards Tribunal