

An appeal

- by -

Masev Communications
("Masev")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/175

DATE OF DECISION: December 7, 2004

DECISION

SUBMISSIONS

John Vandespkyer	on behalf of Masev Communications
Murray Superle	on behalf of the Director of Employment Standards
Maggie Murray	on her own behalf
Tania Lurie	on her own behalf
Tim Hope	on his own behalf

OVERVIEW

This is an appeal by Masev Communications ("Masev"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued September 24, 2004.

Maggie Murray, Tania Lurie and Tim Hope worked in a variety of jobs for Masev, a youth marketing business, until November 2003, at which time Masev ceased operations. They filed complaints alleging that Masev had contravened the *Act* in failing to pay them regular wages and/or commission wages, employer expenses, annual vacation pay, overtime pay and compensation for length of service.

Following an investigation into the complaints, the Director's delegate determined that Masev contravened the *Employment Standards Act* in failing to pay all three complainants' wages, compensation for length of service, annual vacation pay, employer expenses, and commission wages. The delegate issued a Determination in the total amount, with interest, of \$16,826.96. The delegate also imposed a \$500 penalty on Masev for a contravention of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulations*.

Masev alleges that the Director erred in law, and failed to observe the principles of natural justice in making the Determination. Although Masev does not dispute the finding of liability, it does contend that there are errors in the calculation of the amounts owing to all three complainants.

Masev did not seek an oral hearing, and I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUE

Did the delegate err in law in calculating the amounts owed to the complainants?

Did the delegate fail to observe the principles of natural justice in preferring the evidence of the complainants over that of the employer?

FACTS AND ARGUMENT

Masev provided the delegate with a number of letters in response to the complaints, as well as documentation including employment agreements, records of employment and some pay records. Masev acknowledged that it had ceased operations for financial reasons, and that the complainants were owed some wages. They did dispute the complainants' claims for vacation pay and wages for "flex" days. Counsel for Masev indicated that vacation pay and sick day records were kept separately by Masev's former controller, and that they could not be located.

On April 27, 2004, the delegate sent a summary of his findings to the parties for comment. Masev agreed with the statements regarding the employer's records with one exception.

The delegate calculated the wages and compensation owed to each complainant based on the documents provided by the employer. The employer's documents were also used to calculate the claimants' entitlement for employer's expenses and improper deductions from wages.

The delegate found insufficient evidence to substantiate claims for "flex" day payments.

In light of the absence of any employer records, and based on each of the employees' records, the delegate preferred the evidence of the employees to determine that vacation pay was owed.

With respect to Ms. Murray, the delegate also determined that commission wages were owed.

Masev contends that the delegate erred in calculating compensation for length of service and vacation pay for Mr. Hope, using an incorrect annual salary. Masev also contends that, for each of the employees, the delegate "placed too much faith and complete reliance on the claimant's records", and suggests, "as a measure of fairness" to both parties, that Masev pay 50% of the amount determined owing by the delegate. Masev also contends that Ms. Murray was not entitled to commission wages, as she did not secure the sponsors listed on the commissions form relied on by the delegate.

The delegate submits that Masev did not dispute his calculation of Mr. Hope's wages as set out in his April 27, 2004 letter. He further says that the pay records provided by the employer, although incomplete, show that his wage calculations were correct.

The delegate contends that Masev's submission that all vacation time had been taken was not sustainable, and that the employees' evidence is to be preferred. Furthermore, he notes that, with respect to Ms. Murray, a vacation request form had been signed by a company official on November 18, 2003, indicating that she had 5 days vacation due to her.

Finally, the delegate says that the employer's January 2004 submission indicated that Ms. Murray had an expense claim of \$2368, and that this amount was reflected in his April 27, 2004 summary letter to Masev. He says that, in the alternative, if the amount is not owed to Ms. Murray as commission wages, it is owed for employer's expenses.

Mr. Hope, Ms. Murray and Ms. Lurie's submissions all seek to have the Determination upheld, and contain submissions I infer were originally presented to the delegate.

ANALYSIS

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

The burden of establishing the grounds for an appeal rests with an Appellant. Having carefully reviewed the record and the submissions of the parties, I am not persuaded that the delegate erred in law or failed to observe the principles of natural justice.

Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. Parties alleging a denial of a fair hearing must provide some evidence in support of that allegation. (see *Dusty Investments Inc. dba Honda North* BC EST #D043/99)

Throughout the investigation, the parties were given full opportunity to present their case. For a period of time, Masev was represented by counsel. The delegate sent the parties a summary of his findings for comment prior to issuing the Determination.

The delegate reviewed the material before him and arrived at reasoned conclusions. With respect to the vacation pay entitlement, he preferred the evidence of the employees over that of Masev. The delegate gave his reasons for preferring that evidence. I am unable to find that he was wrong in so doing, and it is not a denial of natural justice for him to make those determinations.

An appeal is not an opportunity to re-argue a case that has been fully made before the delegate.

The Tribunal will not substitute its findings of fact for that of the director without some substantial reason to do so. (*Kelly* BC EST #D 065/04) I find that, with respect to the calculations and the entitlements to commission wages, there was an evidentiary foundation for the findings of fact made by the delegate. I find no basis to interfere with his conclusions.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated September 24, 2004, be confirmed in the amount of \$17,326.96, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal