

An appeal

- by -

Donald Healey

- 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/168

DATE OF DECISION: December 16, 2004

DECISION

SUBMISSIONS

Donald Healey	on his own behalf
Rod Bianchini	on behalf of the Director of Employment Standards
Kitty J. Heller, Owen Bird	on behalf of Jeld-Wen of Canada

OVERVIEW

This is an appeal by Donald Healey, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued August 16, 2004.

Mr. Healey was a salesman for Jeld-Wen Millwork Distribution, a division of Jeld-Wen of Canada Ltd. (“Jeld-Wen”), from September 3, 2002 until June 27, 2003. Mr. Healey filed a complaint alleging that he was owed commission wages. Mr. Healey also contended that he entered into an agreement to sell windows for a company called Willmar Windows (“Willmar”), that Willmar owed him commission wages, and that Willmar and Jeld-Wen were associated companies.

The Director’s delegate held a hearing into Mr. Healey’s complaint on November 18, 2003. Mr. Healey appeared on his own behalf. Jeld-Wen was represented by counsel and its general manager, Andy Munro.

Following the hearing, the delegate determined that Jeld-Wen had not contravened the *Act*, and that Mr. Healey was not entitled to further wages. The delegate also concluded that Jeld-Wen was not associated with Willmar pursuant to section 95 of the *Act*.

Although Mr. Healey sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties.

Mr. Healey contends that the delegate erred in law and failed to observe the principles of natural justice. He also contends that evidence has become available that was not available at the time the Determination was being made.

ISSUES

1. Did the delegate err in law in making the findings of fact that he did?
2. Did the delegate err in law in concluding that Willmar and Jeld-Wen were not associated companies?
3. Did the delegate fail to observe the principles of natural justice by failing to address issues raised in Mr. Healey’s written complaint?
4. Has new and relevant evidence become available that would have led the delegate to a different conclusion on the issues before him?

FACTS

From September, 2002 until December 2002, Mr. Healey received a monthly salary equal to \$30,000 per year plus a \$1,000 per month flat rate commission. Mr. Healey contended that, after January 1, 2003, he was not paid the commission wages he was entitled to according to his contract.

The delegate found that Mr. Healey and Mr. Munro, Jeld-Wen's general manager, developed a "sales budget" in January 2003, which was later revised at Mr. Healey's request as Mr. Healey found that he could not meet his sales targets. The delegate found that the annual budget was developed using previous years' sales, and broke out the payment of wages and commissions related to actual sales. The delegate found that the budget was a guide for both Mr. Healey and Jeld-Wen to monitor sales performance and wage payments.

The delegate concluded, in the absence of any dispute by Mr. Healey, that the initial budget document formed the agreement governing Mr. Healey's remuneration. He further determined that Mr. Healey was involved in drafting his conditions of work and remuneration. The delegate further found that Mr. Healey was paid at least his salary of \$30,000 and, in every month but April 2003, commission wages.

The delegate found that the parties negotiated a contract of employment, and that this agreement did not fall below the minimum standards provided in the *Act*. The delegate determined that the *Act* did not prevent Jeld-Wen from treating money paid over and above actual commissions as an advance against future commission earnings, and that the draw could be set off against future earnings provided that an employee was paid at least the minimum wages for all hours worked.

The delegate determined that Mr. Healey was paid a salary consistent with the initial budget document, and that his commission was consistent with sales shown on the commissions and draw payment documents. The delegate also determined that Mr. Healey had been paid minimum wage for each pay period in accordance with the *Act*.

The delegate found that Mr. Healey had been reimbursed for his expenses, and that they had not been deducted from any commissions owing to him.

The delegate set out the four conditions necessary to make a determination that Jeld-Wen and Willmar were related pursuant to section 95 of the *Act*. He concluded that the evidence did not support making such a finding. He found that, although Mr. Healey asserted that Willmar was a Jeld-Wen company, he presented no evidence to show there was common control and direction of the companies. Further, the delegate determined that Mr. Healey had not filed a wage complaint against Willmar, and therefore, there was no statutory purpose in treating the companies as one employer:

The fourth condition is not supported in evidence either. Healey files a complaint against Jeld-Wen and attempts in the complaint to capture Willmar wage issues as well. No complaint was filed against Willmar and no attempt was made to recover any alleged wages from Willmar. Healey is asking me to make assumptions on the allegations that Jeld-Wen and Willmar, for the purposes of the *Act*, are one and the same and that wages are owed. I do not see this in the evidence provided by Healey and cannot support a true statutory purpose for treating Jeld-Wen and Willmar as one employer. I conclude the argument Jeld -Wen and Willmar are associated fails on the conditions as stated above. [reproduced as written]

ARGUMENT

Mr. Healey argues that the delegate erred in finding that the initial budget document constituted his contract of employment. He denies that he participated in the creation of the sales budget, or that all his expenses were reimbursed. He further contends that the delegate erred in finding that Jeld-Wen and Willmar were not associated companies when he took no steps to investigate the relationship between them.

Healey further argues that the delegate failed to address several areas of his complaint, such as offsets to his commissions, constructive dismissal and misrepresentation.

Mr. Healey says that he now has the names and financial resources to call witnesses that were not available at the time of the hearing who would testify to a pattern of misrepresentation by Mr. Munro. Mr. Healey also says that he has call emails that would demonstrate Mr. Munro's knowledge that Mr. Healey was performing work for Willmar. Finally, Mr. Healey asserts that he is aware that "additional persons or person has knowledge of this dispute and that testimony could be essential to my case".

Jeld-Wen contends that, although the compensation package is complex, Jeld-Wen spent considerable time at the hearing explaining the pay formula to the delegate. It submits that Mr. Healey, who was present at the hearing by telephone, provided his own explanation of the compensation package, and asked questions of Mr. Munro. Jeld-Wen says that, based on the documentary evidence before the delegate, which was not disputed by Mr. Healey, the delegate arrived at findings of fact. Jeld-Wen contends that Mr. Healey provided no basis to overturn the delegate's findings.

Jeld-Wen says that, although Mr. Munro testified that Jeld-Wen and Willmar are associated companies, they are separately managed, and that, in any event, the proposal to have Jeld-Wen salesmen sell Willmar products in British Columbia never materialized.

Jeld-Wen contends that Mr. Healey is advancing arguments already made before the delegate about how his compensation package should be construed, and that the delegate rejected those arguments. It submits that Mr. Healey has no new evidence to support a finding that the delegate erred in rejecting Mr. Healey's arguments.

Finally, Jeld-Wen says that Mr. Healey has not described the new evidence he wishes to call or how that evidence would change the delegate's findings.

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.

Errors of Law

An appeal is not an opportunity to re-argue a case that has been fully made before the delegate. Provided that there is an evidentiary basis for the delegate to make the findings of fact that he did, the Tribunal will not substitute its findings of fact without a substantial basis to do so. (*Kelly* BC EST #D065/04)

Mr. Healey must provide persuasive and compelling evidence that there were errors of law in the Determination.

The record shows that, although the parties agreed on the document that formed the basis for Mr. Healey's compensation package, they disagreed about the interpretation of that document. The delegate, as the finder of fact, is entitled to prefer one parties' evidence over that of the other. Doing so does not constitute an error of law. Having reviewed the evidence, I find that there was some evidentiary basis for the delegate to make the findings of fact that he did, and find no basis to allow the appeal in this respect.

However, based on a reading of section 95, and taking a broad and liberal interpretation of the *Act*, (*Re Rizzo & Rizzo Shoes* [1998] 1 S.C.R. 27, and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986), I find that the delegate erred in placing an evidentiary burden on Mr. Healey to show that Jeld-Wen and Willmar were under common control or direction.

As noted in *Kyle Freney* BC EST#D 130/04, in the past the Branch investigated all complaints, and it continues to do so in some cases. In other cases, however, it follows a relatively new "adjudication" process. This process was apparently followed here. Under that process, the delegate schedules an oral hearing attended by both parties (who are typically not represented by legal counsel) and the parties are expected to provide whatever evidence they have in support of their respective positions. The delegate then makes a decision on the basis of the evidence presented at the hearing rather than on the basis of whatever evidence or information he or she might have been able to gather through an investigation process.

The Director interprets the *Act* as allowing a choice between an adjudication process and an investigation process. There may well be some circumstances where an adjudication process will suffice to meet the purposes of the *Act* as set out in section 2, including a) ensuring that employees in British Columbia receive at least basic standards of compensation and conditions of employment, b) the promotion of fair treatment of employees and d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. However, there may be circumstances where a purely adjudicative process will not suffice to meet these objectives and the legislation effectively imposes an obligation on the Director to investigate.

In my view, one such circumstance is where a complaint raises a reasonable basis for the potential application of s. 95 of the *Act*. Significantly, this provision is found in Part 11 of the *Act* – Enforcement.

Under the scheme of the *Act*, enforcement is a matter which rests almost exclusively in the hands of the Director, not the complainant. In my view, where a complainant alleges that two companies are associated and there is some evidentiary support for this allegation, it is not reasonable or in accordance with the statutory scheme established under the *Act* for the Director to expect the complaining employee to investigate and substantiate whether companies are in fact associated within the meaning of section 95. Rather, the *Act* contemplates that the Director will investigate this issue. This is evident from the wording of the provision which states that, if the Director considers that businesses, trades or undertakings are

carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction, the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this *Act*. (my emphasis).

Furthermore, Part 10 gives the Director significant powers in order to ensure compliance with the *Act*. Those powers include the power to inspect any records that may be relevant to an investigation (s. 85(1)(c)), require a person to disclose a matter required under the *Act* and require that the disclosure be under oath or affirmation (s. 85(1)(d)), and require a person to produce, or deliver records for inspection (s. 85(1)(f)). Those powers, which are of an investigatory nature, are not given to parties making a complaint. In addition, the Director, unlike the parties, is given the power and authority of a commissioner to compel witnesses under sections 12, 15 and 16 of the *Inquiry Act* (s. 84)

Section 95 does not impose an evidentiary burden on a complainant to establish that companies are associated, as the delegate has done in this case. The duty of determining whether businesses are carried on by or through more than one corporation or any combination of them under common control or direction rests with the Director, once a complainant has provided *prima facie* evidence of an association. In this instance, Mr. Healey did so. There was some evidence before the delegate, including an admission by Jeld-Wen's general manager, that there was a relationship between the companies. There was also some evidence that Mr. Healey had performed a significant amount of work for the company in British Columbia. The person best situated to gather information about companies carrying on business in British Columbia, including the names and addresses of directors, is the Director.

In my view, and based on a purposive reading of the *Act*, the delegate erred in placing a burden on a complainant to establish that the companies were related.

I also find that the delegate erred in concluding that Mr. Healey had not filed a complaint against Willmar and made no attempt to recover wages from that company.

The evidence discloses that Mr. Healey did in fact claim \$8,736 in commission wages from Willmar in his initial complaint form. Although he did not file a separate complaint against Willmar, presumably that was so because he was of the view that it was associated with Jeld-Wen and that the claim would be addressed at the same time. Furthermore, in subsequent documentation, Mr. Healey expanded on the nature of his complaint, and identified a relationship of sorts between Willmar and Jeld-Wen.

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*)

Simply because the delegate did not accept Mr. Healey's interpretation of the documents forming the basis for his compensation package does not constitute a breach of natural justice, and I am unable to find that the appeal has been substantiated in this respect.

Mr. Healey also says that he was denied natural justice by the delegate's failure to address his claim for compensation for length of service (which he characterizes as constructive dismissal), commission offsets and misrepresentation.

The record does not disclose whether those issues were addressed in the hearing, however, none of them are referred to in the Determination. Mr. Healey also says that, at the hearing, the parties agreed that \$1,000 was unlawfully deducted from his January wages and remained owing. This is not recorded anywhere in the Determination.

The parties and the Tribunal would have been better served had the delegate, even briefly, referred to each element of the claim and identified his findings on each. His failure to do so has denied Mr. Healey a fair hearing.

I find that the appeal has been substantiated in this respect.

New Evidence

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.

I am unable to find that Mr. Healey has satisfied the test set out in *Bruce Davies* for new evidence.

Mr. Healey could have called those witnesses he says were not available at the time of the hearing, had he exercised due diligence. Mr. Healey's lack of resources, or the potential witnesses' unavailability at the time of the hearing is not a sufficient basis for granting an appeal on this ground. Mr. Healey could have sought an adjournment of the hearing in order to accommodate the witnesses' schedule, or obtained their evidence in affidavit form if they were unable to appear at the hearing. Mr. Healey does not say who the witnesses are, or what attempts he made to secure their attendance at the hearing. He also does not say what their evidence would have been had they in fact appeared.

I infer from Mr. Healey's submission that he had access to the emails to which he refers at the time of the hearing, and could have submitted them to the delegate.

Finally, although Mr. Healey says that he is aware of "additional persons" who might be able to give relevant evidence, he does not say who the person or persons are or what the evidence might be. Mere

assertion that there may be a witness who could give some evidence on some point does not establish a basis of appeal on this ground.

ORDER

I Order, pursuant to Section 114 of the *Act*, that the Determination dated August 16, 2004, be referred back to the delegate for further investigation.

Carol L. Roberts
Member
Employment Standards Tribunal