

An appeal

- by -

Pierre Borduas operating as Convoi Intermodal Inc.; Rachel Guay operating as Convoi Intermodal Inc.; Convoi Intermodal Inc. and Transport Convoi (International) Inc. Convoi Transport (International) Inc. operating as Transport Convoi Ltdd.; Transport Convoi (International) Inc. Convoi Transport (International) Inc. operating as Convoi Transport - Associated under Section 95 Employment Standards Act (appeal by Convoi Intermodal Inc.)
("Convoi Intermodal")

- 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/103

DATE OF DECISION: June 27, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Pierre Borduas operating as Convoi Intermodal Inc., Rachel Guay operating as Convoi Intermodal Inc., Convoi Intermodal Inc., Transport Convoi (International) Inc., Convoi Transport (International) Inc. operating as Transport Convoi Ltee., Transport Convoi (International) Inc., Convoi Transport (International) Inc. operating as Convoi Transport - associated under Section 95 of the Act (collectively, “Convoi Intermodal”) of a Determination that was issued on February 26, 2003 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Convoi Intermodal had contravened Part 3, Section 18(1), Part 4, Sections 40(1) and 42(5), Part 5, Section 45, Part 7, Section 58(3) and Part 8, Section 63(2) of the Act in respect of the employment of several employees of Convoi Intermodal and ordered Convoi Intermodal to cease contravening and to comply with the *Act* and to pay an amount of \$70,027.69.

Convoi Intermodal has appealed the Determination on the ground that new evidence has become available that was not available at the time the Determination was being made. The appeal also asserts that one of the persons on whose behalf the Determination was made, James (Jim) Gordon Smith (“Smith”) was never an employee of Convoi Intermodal, but was an independent contractor working for another entity.

ISSUE

The issue in this appeal is whether Convoi Intermodal has shown an error in the Determination sufficient to justify the intervention of the Tribunal under Section 115 of the *Act*.

FACTS

The corporate entity Convoi Intermodal Inc. is an extra-provincial corporation incorporated under the federal Business Corporations Act. Federal records show the corporation as having a registered office in Mississauga ON, a mailing address in LaSalle, PQ and lists its directors as Pierre Borduas and Rachel Guay.

Convoi Intermodal Inc. operated a “transportation business” in British Columbia from a location in Richmond, but was not registered as an extra-provincial company operating in this province as required by the *Company Act, RSBC 1996, ch. 62*.

The Determination indicated some relationship between Convoi Intermodal Inc. and Transport Convoi (International) Inc./Convoi Transport (International) Inc. based on information given to the Director by an unnamed customer of Convoi Intermodal Inc. and the presence of Pierre Borduas as a director of both corporate entities. I have reviewed the record provided by the Director with this appeal and can find no record of the discussion referred to. The Determination associated Pierre Borduas operating as Convoi Intermodal Inc. and Rachel Guay operating as Convoi Intermodal Inc. with the other entities named, but contains no reasons for doing so.

Several complaints were received by the Director from mid-January to early February, 2003. The Determination notes the “preliminary findings” on many of the complaints were delivered to the business address in this province and apparently forwarded to the head office of Convoi Intermodal Inc. No response had been received by the Director on the “preliminary findings” before the Determination was issued.

In respect of the claim of Smith, the Determination reasons state:

Jim Smith and I had a conversation regarding independent contractor or employee. I reviewed the relevant fact sheet with him and discussed the tests. I applied the test to the information he supplied and concluded that he was an employee.

No facts are provided in the Determination or the reasons nor is there anything in the record showing the information relied upon by the Director in reaching the conclusion Smith was an employee for the purposes of the *Act*.

Included in the record, but not referred to in the Determination, is a letter from Samson Belair Deloitte & Touche Inc. stating they had been appointed Interim Receiver of Transport Convoi et al, including Convoi Intermodal Inc. on January 15, 2003. On April 16, 2003, Samson Belair Deloitte & Touche Inc. communicated to the Tribunal a stay of proceedings under Section 69.3(1) of the *Bankruptcy and Insolvency Act* of matters before the Tribunal. The Tribunal has decided to adjudicate this appeal as it does not exclusively involve those entities who have submitted a proposal in bankruptcy, but also affects Mr. Borduas and Mr. Guay in their personal capacities.

ARGUMENT AND ANALYSIS

The Determination was issued under Section 81 of the *Act* on February 26, 2003. The reasons for the Determination are dated January 31, 2003. That is but one of the curious aspects of the Determination and the reasons given for it. Among other deficiencies, the Determination, and the reasons for it, does not provide the factual or legal basis upon which the Director arrived at the conclusion that Smith was an employee for the purposes of the *Act*. Nor does it explain the basis upon which Mr. Borduas and Mr. Guay came to be associated with the other named entities under Section 95 of the *Act*.

The Tribunal has said on many occasions that the reasons, and their sufficiency, are a necessary component of ensuring compliance the purposes of the *Act* and with the rules of natural justice. In *Hilliard*, BC EST # D296/97, the Tribunal said:

One of the purposes of the Act, as set out in Section 2, is to “. . . promote the fair treatment of employees and employers. . .”. Another purpose is to “. . . provide fair and efficient procedures for resolving disputes. . .”. In my view, neither of these purposes can be achieved in absence of a clear set of reasons for a decision that either an employee is owed wages or is not owed wages by an employer. In addition, to ensure that the principles of natural justice are met, a person named in a Determination is entitled to know the decision resulting from an investigation and the basis for that decision. Without sufficient reasons, a person cannot assess the decision which includes knowing the case made against them or the case to be met if there is an appeal, and determining whether there are grounds for an appeal.

The Director has failed to observe principles of natural justice by not providing reasons for the decision to treat Smith as an employee and not providing reasons for associating Mr. Borduas and Mr. Guay in their personal capacities under Section 95 of the *Act*.

While Convoi Intermodal has stated the grounds for appeal as being new evidence, the Tribunal is not limited in its analysis to the stated ground or grounds, particularly where it is apparent the Director has failed to observe principles of natural justice.

The appeal succeeds on that ground on the obvious failure of the Director to observe principles of natural justice. In some circumstances it would be appropriate to refer the Determination back to the Director. In this case, however, there is such a congeries of defects in the Determination, not simply in its analytical aspects, but also in its investigative process, that I do not believe the Determination can be cured. The appropriate response is to cancel it entirely, allowing the Director to recommence the complaint process unencumbered by the problems associated with the Determination under appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 26, 2003 be cancelled.

David B. Stevenson
Adjudicator
Employment Standards Tribunal