

An appeal

- by -

Hub-City Boat Yard Ltd., David Rose (Officer or Director of Hub-City Boat Yard Ltd.) and by Sherri Rose (Officer or Director of Hub-City Boat Yard 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

ADJUDICATOR: Ian Lawson

FILE No.: 2003A/215, 2003A/216 & 2003A/217

DATE OF DECISION: October 21, 2003

DECISION

SUBMISSIONS

David and Sherri Rose	on behalf of themselves and Hub-City Boat Yard Ltd.
Robert Muir	on behalf of himself
Robert Scotty Morrison	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by David Rose and Sherri Rose (“Roses”), who are directors of Hub City Boat Yard Ltd., under s. 112 of the *Employment Standards Act* (“Act”). The appeal is from three Determinations issued by Robert (Scotty) Morrison as a delegate of the Director of Employment Standards on July 2, 2003. The first Determination required “Hub-City” Boat Yard Ltd. (the hyphenation appears only in the Determinations and not in the company’s own documents) to pay wages, vacation pay and interest to Robert Muir (“Muir”) in the amount of \$4,471.86. The second and third Determinations imposed personal liability on the Roses for two months of the wages found owing to Muir. All three Determinations bear the same number, and as the Roses apparently continued to hold office as directors after Hub City Boat Yard Ltd. ceased operations in 2001, they filed this appeal on July 22, 2003. The appeal is now decided without an oral hearing, on the basis of written submissions.

FACTS

Hub City Boat Yard Ltd. operated a boat brokerage in Nanaimo. On March 2, 2001, Muir entered into a written agreement with Hub City Boat Yard Ltd., setting out how commissions on boat sales were to be divided between himself as boat broker and the company. The Determinations are silent as to how Muir’s employment came to an end, but the delegate found Muir was an employee for the period March 2, 2001 until October 16, 2002. The Determination which imposed personal liability on David Rose contains the following paragraph:

The BC On-line: Registrar of Companies – “Corporation Search”, indicates as at January 23, 2003, Hub-City Boat Yard Ltd. was incorporated on October 10, 1991. David Rose was listed as a Director/Officer. Robert Muir’s unpaid wages were earned between April 17, 2002 and October 16, 2002. David Rose was a Director/Officer of Hub-City Boat Yard, and was so appointed at the time Robert Muir’s wages were earned and payable.

Attached to the first Determination is a letter from David Rose dated April 30, 2003, under letterhead styled “Hub City Boat Yard (2001) Limited,” which states in its entirety:

Please note that Hub City Boat Yard Ltd. has ceased business operations. This corporation was located at 1250 Stewart Ave., Nanaimo, B.C.

Hub City Boat Yard (2001) Ltd. is a separate corporation. This corporate entity operates at 1520 A Stewart Ave., Nanaimo, B.C. This is a separate company at a separate location.

Mr. Muir and Mr. Skilton offered their services to Hub City Boat Yard Ltd., which no longer exists.

Hub City Boat Yard (2001) Ltd. was established to operate a new business venture at a new location in 2001. Hub City Boat Yard Ltd. has closed its facilities and yacht sales office at 1250 Stewart Ave.

In order to avoid any confusion, please contact myself so we may discuss this matter.

The first Determination states that a hearing was held on May 12, 2003. The Roses did not appear, although the delegate did state he had considered the letter sent by Mr. Rose.

ARGUMENT

Among other things, the Roses argue the Director failed to observe the principles of natural justice in making the determination, as follows:

In communications with the Director in Exhibit #1 [the letter from David Rose dated April 30, 2003], please refer to the last sentence. We asked clearly for contact regarding the closure of our company. We were denied this request. No contact was made. As such, we remained confused as to our status. As a result, a Determination was made without our input.

The reply argument filed on behalf of the Director reads, in its entirety:

1. Hub-City Boat Yard Ltd. was aware of the adjudication they chose not to participate.
2. Hub-City Boat Yard Ltd. submitted a letter dated April 30, 2003 (marked exhibit #1, in the Corporate Determinations). The arguments raised in this letter were taken into consideration in the findings of the Determinations.
3. The grounds for appeal numbered 1 and 3 is new evidence and was not presented for consideration at the adjudication.
4. The record, as requested by the Employment Standards Tribunal, is contained in the Determinations.

ISSUE

Was there a failure to observe the principles of natural justice in making the Determinations?

ANALYSIS

Section 112 of the Act was recently amended to specify failure to observe the principles of natural justice as a ground of appeal. This Tribunal has held that natural justice is a simple concept that may be defined as “fair play, nothing more”: *Re Ossoble*, BCEST#D229/03. Professor H.W.R. Wade’s *Administrative Law* has been a key reference in the area of administrative law for the past 40 years, through 8 editions. While the general duty of fairness now consumes most doctrinal discussions of natural justice, Wade’s 3rd

edition in 1971 remains the most elegantly and concisely expressed of all the editions, and contains this classic statement:

‘Natural justice’ is the name given to certain fundamental rules which are necessary to the proper exercise of every kind of power. In English law it covers two rules: first, that a man may not be judge in his own cause; and secondly, that a man may not be condemned unheard. These rules can be taken for granted in the administration of justice in courts of law. They should equally apply to the decisions of statutory tribunals. Finally, they should apply to all administrative acts in so far as the nature of the case admits. For all power ought to be exercised fairly, both in appearance and in reality. It is the universality of this ideal of justice which leads to its being called ‘natural’.

In the present appeal, there is nothing in the Determination or in any of the material filed to indicate how and when notice of the delegate’s hearing was given, or to whom. As the Director’s reply submission indicates, the “record” of proceedings before the delegate is “contained in the Determinations.” Nothing in the Determinations or supporting material indicates that the delegate contacted Mr. Rose as requested, or that any communication at all occurred between the parties prior to the hearing date. I therefore presume the delegate ignored Mr. Rose’s letter and if notice of the hearing date was given, it was sent to the address at which Hub City Boat Yard Ltd. had closed its offices. The first Determination is so addressed, although I note it appears to have been copied to a “Registered and Records Office” at 301 Franklyn St., Nanaimo.

If my assumption is correct, then the delegate gave notice of his hearing to an address he knew was vacant. The delegate then proceeded in the absence of the Roses on May 12, 2003, but knowing the Roses had given him a correct address and had specifically requested they be contacted prior to the hearing. The delegate decided the matter, knowing he had not contacted the Roses nor given them the courtesy of a reply to their letter of April 30, 2003.

In these circumstances, I am satisfied the delegate failed to observe the principles of natural justice in making the Determinations under appeal. The right to be heard is a cornerstone of natural justice, and by proceeding as he did, the delegate violated that right in respect of the Roses.

I am further concerned about the adequacy of the reasons given by the delegate in the first Determination: the delegate makes no reference to the standard tests for determining whether an employment relationship existed between the parties, and does not mention the possibility the new company is a successor employer. There is no indication the delegate undertook even a basic inquiry into these issues in conducting his hearing. At a minimum, the Roses’ letter raised the question whether the second company was a successor employer, thereby rendering moot the question of directors’ liability. If the first company had ceased operating in 2001, then the delegate would have had to identify Muir’s employer in 2002. There seems to be some doubt whether the delegate was addressing the right company when he made the first Determination. The delegate’s reasons are so sparse, in fact, that I infer he felt it unnecessary to address these important questions merely because Hub City Boat Yard Ltd. did not appear at his hearing.

In these circumstances, I find the delegate further failed to observe the principles of natural justice by failing to give adequate reasons for the first Determination. Neither the appellants nor this Tribunal are able to tell how the delegate reached the conclusion Muir was an employee, and Hub City Boat Yard Ltd. was the correct employer. As a result, the Roses cannot tell whether the delegate erred in law in making his Determination, which deprives them of any effective right of appeal and limits this Tribunal’s ability to decide any appeal they might bring. No system of administrative justice can be fair in the absence of adequate reasons for decision (see *Re Monarch Beauty Supply*, BCEST #D062/00).

ORDER

I find the first Determination made by Mr. Morrison fails to observe the principles of natural justice and the appeal should be allowed. As the second and third Determinations impose personal liability as a result of the first Determination, they are tainted by the same errors. Pursuant to s. 115 of the Act, I order that all three Determinations bearing #46918 made on July 2, 2003 be referred back to the Director.

Ian Lawson
Adjudicator
Employment Standards Tribunal