

An appeal

- by -

Hamid Hadilou
("Hadilou")

- 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: David B. Stevenson

FILE No.: 2005A/185

DATE OF DECISION: January 6, 2006

DECISION

SUBMISSIONS

Hamid Hadilou	on his own behalf
Ravi Sandhu	on behalf of the Director

OVERVIEW

1. This is an appeal under Section 112 of the *Employment Standards Act* (the “Act”) by Hamid Hadilou (“Hadilou”) of a Determination that was issued on September 13, 2005 by a delegate of the Director of Employment Standards (the “delegate”).
2. Hadilou had filed a complaint with the Director claiming entitlement to regular and overtime wages, length of service compensation, annual vacation pay and statutory holiday pay from his former employer, The Master Plumber Ltd. (“Master Plumber”). The delegate found that Hadilou had not proved his complaint and, relying on Section 76(3)(e), advised Hadilou that no further action would be taken.
3. In his appeal, Hadilou says he never received any documentation from Employment Standards concerning his claim and he received no request to provide evidence to support his claim.
4. Even though Hadilou has requested a hearing, the Tribunal has reviewed the appeal and the materials submitted with it and the submissions of the parties and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

5. The issue in this appeal is whether Hadilou has shown the delegate erred in denying his claim.

THE FACTS

6. Hadilou was employed by Master Plumber from September 21, 2004 to April 5, 2005 as a Services Technician.
7. He initiated the self help process on April 25, 2005 and, when Master Plumber failed to respond to that process, filed a complaint with the Employment Standards Branch on May 16, 2005, claiming he was owed regular and overtime wages, annual vacation pay, statutory holiday pay and length of service compensation. On the complaint form, Hadilou provided certain information about himself, including his address and a telephone number where messages could be left.
8. Master Plumber ceased operating its business on, or about, June 29, 2005. Following closure of the business, the Director received complaints from other employees. Hadilou’s complaint was investigated at the same time as those filed by the other employees. During the complaint process, the delegate issued a Demand for Employer Records. Master Plumber did not comply with this demand.

9. The Determination states the delegate first contacted Hadilou about his complaint on June 20, 2005 and asked for a record of his hours, which Hadilou said he would provide. This assertion is included in the Determination under “Background (facts not in dispute)”, although clearly that assertion is in dispute. Hadilou says that although he talked with the delegate on June 20, the delegate never asked him to provide evidence to support his claim.
10. The Determination indicates the delegate attempted to contact Hadilou on four occasions after June 20, twice on July 12, 2005 and twice more on July 13, 2005. On those occasions, the Determination states that a woman who did not speak English answered the phone and said Hadilou was not at home. Hadilou agrees that is possible, since his mother (who does not speak English) was visiting him in that time period. On August 3, 2005 the delegate sent a letter to Hadilou at the address shown on the complaint form. Among other things, the letter asked Hadilou to contact the delegate to “review the issues” of his complaint by August 17, 2005 and warned that without his participation, his complaint might be found to be without merit.
11. Hadilou says he never received this letter. The letter was not sent by registered mail.
12. The Record, required to be provided by the Director under subsection 112(5) of the *Act*, includes the complaint, a completed Self Help Kit, two letters from Hadilou to Master Plumber concerning events relating to the termination of his employment, two spreadsheet printouts (one showing, among other things, total hours worked, on-call hours, regular and overtime hours paid and hours banked and the other showing overtime hours worked by date), a copy of Hadilou’s Record of Employment, the August 3, 2005 letter and the Employment Standards Branch “Complaint and Information Docket”. No record of the June 20, 2005 telephone discussion is found in the Record.
13. The appeal, which is dated October 15, 2005, attaches most of the material that is contained in the Record and also includes detailed daily time sheets for Hadilou for the full period of his employment and photocopies of his wage statements for the employment period.

ARGUMENT AND ANALYSIS

14. In this appeal, Hadilou has the burden of persuading the Tribunal there has been an error made by the delegate. Subsection 112(1) of the *Act* sets out the grounds on which an appeal may be brought:
 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 made.*
15. While the appeal form submitted by Hadilou does not specifically identify on which of the above grounds the appeal is based, it is clear that the substance of the appeal is a perceived error of law and failure to observe principles of natural justice and it will be adjudicated on that basis (see *J.C. Creations Ltd, (c.o.b. as Heavenly Bodies Sport)*, BC EST #RD317/03 (Reconsideration of BC EST #D132/03)). Hadilou has provided additional evidence with the appeal, but that evidence is not being submitted as “new evidence”,

but as evidence which Hadilou could have provided if the delegate had communicated with him and asked for information supporting the spreadsheet printouts of regular, overtime and banked hours he had provided with his complaint.

16. Hadilou's argument is fairly basic: he was never asked by the delegate to provide evidence in support of his claim and it is unfair to have denied his claims on the alleged failure to provide this information.
17. The delegate delivered a reply to the appeal on November 4, 2005. In the reply, the delegate says he did ask Hadilou, on June 20, that he needed further evidence and that Hadilou said he would provide it to him. The delegate also notes there were additional attempts to contact Hadilou by phone and, on August 3, a letter was sent asking Hadilou to contact the delegate. In the delegate's reply, he says Hadilou did not contact him until September 15, 2005, nearly three months after their initial conversation and after the Determination had been received.
18. The delegate also says the additional evidence submitted by Hadilou with his appeal was available when the Determination was made and should not be accepted by the Tribunal.
19. This appeal must succeed.
20. In *Kyle Freney*, BC EST #D130/04, the Tribunal made the following comment, with which I agree completely:

The Supreme Court of Canada has repeatedly stated that determining the content of the duty of fairness is a highly contextual exercise. The relevant factors are to be weighed and applied with a view to requiring public bodies to act with courtesy and common sense, in a manner commensurate with the interest at stake, but without imposing unrealistic institutional burdens on the public body provided they comply with the rules of fairness: see most recently, *Congregation des temoins de Jehovah v. Lafontaine (Village)*, 2004 SCC 48. It is what the English have concisely referred to as "fair play in action".

21. The following circumstances are relevant:
 - Hadilou had advanced a serious claim that he had worked for more than 300 hours without being paid for those hours and had been terminated without cause, notice or compensation. As noted in *Kyle Freney*, *supra*, such claims, if valid, lie at the very core of the kind of claims the *Act* was enacted to protect and enforce. The interests at stake weigh heavily in favour of Hadilou.
 - Hadilou had been diligent in pursuing his claims, commencing the self help process almost immediately after his termination and then quickly filing his complaint when Master Plumber failed to participate in the self help process within the time allowed by the Director.
 - Hadilou had not advanced a "naked" claim for wages and overtime. He had provided the delegate with relevant and plausible information on the two spreadsheets, recording the details of his claim for wages and overtime and setting out how he had calculated those claims. Contrary to the conclusion reached by the delegate in the Determination, the information on the spreadsheets and the wages and overtime claims in the self help kit and the complaint form are not inconsistent.
 - Hadilou had all of the information supporting the spreadsheets, in the form of time sheets that detailed his activities and hours worked on a daily basis, and his wage statements. He was able to

provide them with the appeal. There is no reason to believe he could not have also provided them to the delegate if he had received a clear request to do so.

- The Record does not confirm that the delegate asked Hadilou for “further evidence” during the June 20 telephone conversation and there is no confirmation that Hadilou received the August 3, 2005 letter. Based on Hadilou’s diligence in pursuing his claims and the easy availability of the evidence which could have been provided to the delegate, I am inclined to accept that Hadilou was not asked by the delegate to “substantiate his claim” and did not receive the letter. In the context of the June 20 telephone call, I also note the Determination refers to Hadilou indicating he had recorded his hours on a calendar, when clearly that was not the record of hours he had available. What he had available and could have provided to the delegate was a detailed record of his daily activities and hours of work recorded for the specific purpose of providing Master Plumber with the hours for which he should have been paid.
- Master Plumber had failed to comply with a Demand for Employer Records issued by the delegate, did not participate in the complaint process and, most particularly, did not contest any aspect of the claims made by Hadilou.
- Hadilou had detailed the facts upon which his claim for length of service compensation was based. It is disconcerting that the delegate effectively denies this claim without a single reference to it in the Determination.
- When Hadilou communicated with the delegate on September 15, 2005, the delegate had an opportunity to raise his concerns about not receiving evidence to support the claim and allow Hadilou the chance to satisfy those concerns. There is no evidence that he did.
- Even following the filing of the appeal, which included the supporting evidence, the delegate had the authority under Section 86 of the *Act* to vary the Determination within 30 days of receiving the appeal. The delegate has not suggested or stated that evidence is not cogent or persuasive.

22. The Determination and the submission of the delegate refer to the stated purposes of the *Act*: to promote the fair treatment of employees and employers and to provide fair and efficient procedures for resolving disputes. That is a valid point, but in that context, I return to the Tribunal’s decision in *Kyle Freney, supra*, and adopt the following comments:

There is a valid legislative interest in finality, and a legitimate interest in ensuring that parties are subject to appropriate discipline in pursuing and documenting their claims. It is, however, part of the beauty of the law of natural justice that it forces decision-makers to look beyond inconvenience, understandable frustration and the need for clarification and efficiency, to a broader conception of fair play in action, which is not far from asking how any of us would reasonably expect to have been treated in similar circumstances.

23. It was simply unfair for the delegate to have denied Hadilou the protections accorded by the *Act* without ensuring that the requirement imposed by the delegate, to provide additional evidence to substantiate his claim, was communicated, received and understood by Hadilou.

24. While I do not need to go any further and consider whether the decision of the delegate under Section 76(3)(e) was an error of law, I would have found that decision to have been an unreasonable exercise of discretion in the circumstances. I would also have found the delegate erred by failing to consider his

authority under Section 86 of the *Act* when the circumstances showed Hadilou may not have had a fair opportunity to provide the delegate with additional evidence supporting his claim and that evidence was made available to him.

ORDER

25. Pursuant to Section 115 of the *Act*, I order the Determination dated September 13, 2005 be cancelled and the matter referred back to the Director.

David B. Stevenson
Member
Employment Standards Tribunal