

An appeal

- by -

David Leader

- 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: John M. Orr

FILE No.: 2003A/281

DATE OF DECISION: January 19, 2004

DECISION

SUBMISSIONS

David Leader	On his own behalf
Katherine Ford	Counsel on behalf of Moulton Contracting Ltd.
Alan Philips	Delegate on behalf of the Director

OVERVIEW

This is an appeal by David Leader (“Leader”) pursuant to Section 112 of the Employment Standards Act (the “*Act*”) from a Determination dated October 6, 2003 by the Director of Employment Standards (the “Director”).

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

Leader was employed by Moulton Contracting Ltd. (“Moulton”) and filed a complaint alleging that Moulton had failed to pay wages as required by the *Act*. Leader claimed some \$21,420.80 in wages owing. Moulton responded that, in fact, Leader had been overpaid and held back wages to cover the overpayment.

The Director’s delegate investigated the matter and in the course of that investigation held a *viva voce* hearing in which evidence was given under oath. Following that process the delegate determined that Moulton was in breach of the Act in withholding wages and disagreed with the employer’s calculation that there had been an overpayment. However the delegate also disagreed with many of the claims made by Leader. Having considered all of the evidence and the extensive submissions the delegate determined that Leader was owed wages in the amount of \$5293.71. The delegate also imposed an administrative penalty in the amount of \$1500.00.

Moulton has not appealed and accepts the Director’s determination. Leader has appealed on four grounds. Leader claims that the delegate was wrong in his finding in relation to the hourly rate of pay. Leader submits that the delegate was wrong in not allowing for travel time. He claims that there were certain miscalculations in the Determination and fourthly he wishes to submit new evidence.

ISSUE

The issue in this case is whether the appellant has raised issues that amount to errors in law or breaches of natural justice that would persuade the Tribunal to vary the Determination. A second issue is whether new evidence should be considered.

ANALYSIS

I am not satisfied that new evidence should be admitted. I am not persuaded that the evidence was not available at the time of the investigation or the hearing held by the delegate. Leader has submitted this evidence in the form of a letter. There is no explanation as to why this could not have been presented, at least in this form, at an earlier time. Accordingly I dismiss this ground of appeal.

Leader has made extensive and detailed submissions to support his arguments that the delegate made an error in arriving at the hourly rate of pay and to support his argument that travel time should have been paid. He also makes detailed submissions in relation to the method and substance of the calculations done by the delegate.

I have carefully read all of the submissions made by Mr. Leader on this appeal and it is clear to me that Leader disagrees substantially with the factual findings made by the delegate but discloses no error in law or failure to observe the principles of natural justice in making the Determination. While errors of fact may, in some circumstances, amount to errors in law there is no substantial error of fact in this case that would amount to an error in law.

An appeal to the Tribunal is not a re-investigation of the complaint or an opportunity to re-argue the case. In this case the delegate conducted an investigation and conducted an oral hearing in which the parties had a full and fair opportunity to present evidence and make submissions. There was ample evidentiary foundation for the findings of fact made by the delegate and the delegate gave reasonable reasons for his findings. The Tribunal will not substitute its findings of fact for that of the Director without some substantial reason to do so. In this case the delegate's findings were based on a thorough investigation, sworn evidence and a reasonable analysis of the evidence.

In relation to the specific areas of concern raised by Mr. Leader there was evidence upon which the delegate could have come to the conclusion that the hourly rate was based on \$25.00 per hour for the first 8 hours and \$37.50 per hour for the four overtime hours. Mr. Leader simply disagrees with this finding and makes the same submission that was made to the delegate. I am not satisfied that Mr. Leader has met the onus of establishing that the delegate has made an unreasonable or unsubstantiated finding of fact that would warrant review or variation by the Tribunal.

While Mr. Leader correctly notes that in some circumstances travel time must be considered work for the purpose of the payment of wages (*D. Hall & Associates Ltd.*) such payment depends upon the findings of fact made by the delegate. In this case the delegate considered the evidence and the submissions and determined facts that would not give rise to such payment. I see no reason to depart from the findings of the delegate in this regard.

Mr. Leader submits that there are errors in the manner in which the director arrived at the quantum of wages owing. However, the findings of the delegate are findings of fact and the burden is on the appellant to show that the decision is manifestly unfair or that there was no rational basis upon which the conclusions of fact could have been made: *Re: Mykenos Taverna*, BCEST #D576/98. In my opinion Mr. Leader has not met that onus. The delegate appears to have considered all of the submissions of the parties and come to careful and reasoned findings of fact based on the evidence at the hearing.

In his submissions Mr. Leader raises a number of other issues not enumerated in his grounds of appeal. These appear to relate to procedural matters and the completeness of the record. However none of these

items, or the items in total, would persuade me that the delegate failed to observe the principles of natural justice in making his Determination. The delegate considered all of the documents and evidence that Mr. Leader presented. Mr. Leader had a full opportunity to be heard and the opportunity to have an advocate speak on his behalf at the hearing.

In conclusion, I am not persuaded that that the Director's delegate erred in law or failed to observe the principles of natural justice in making the Determination. Accordingly, the Determination is confirmed.

ORDER

I order, under section 115 of the *Act*, that the Determination herein dated October 6, 2003 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal