

An appeal

- by -

Bestway Windows Inc.
("Bestway")

- 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/208

DATE OF DECISION: February 13, 2006

DECISION

SUBMISSIONS

Jeff Dyck	on behalf of Bestway Windows Inc.
David McLelland	on his own behalf
Joy Guilbault	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Bestway Windows Inc. (“Bestway”) of a Determination that was issued on October 28, 2005 by a delegate of the Director of Employment Standards (the “delegate”). The Determination found that Bestway had contravened Part 3, Section 18 of the *Act* in respect of the employment of David McLelland (“McLelland”) and ordered Bestway to pay McLelland an amount of \$1,687.62, an amount which included wages and interest.
2. The Director also imposed an administrative penalty on Bestway under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00.
3. The total amount of the Determination is \$2,187.62.
4. Bestway says the delegate erred in law and failed to observe principles of natural justice in making the Determination. The error in law alleged was in finding Bestway had not paid McLelland all wages owed within 48 hours of his termination. Bestway says the failure to observe principles of natural justice arose from the manner in which the delegate accepted and applied certain facts.
5. The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issues in this case are whether the delegate committed any error or failed to comply with principles of natural justice in making the Determination.

THE FACTS

7. Bestway operates a window sales business. McLelland was hired by Bestway as a sales representative with responsibility to market Bestway’s products in the BC Lower Mainland. The Determination finds McLelland was hired on February 16, 2004 and terminated on February 27, 2004. There is some controversy in this appeal about the former date.
8. Primarily because Bestway is an Alberta based company and the contract of employment was signed in Alberta, there was an issue that arose during the complaint process about whether McLelland’s claim was within the jurisdiction of the *Act*. The delegate found the *Act* did apply to McLelland’s employment.

There is no appeal from that finding and it is, in any event, correct. There was also an issue about whether McLelland was an employee or an independent contractor. The delegate found McLelland was an employee under the *Act*. Once again, that finding is not challenged in this appeal and is, in any event, correct.

9. The delegate found McLelland performed work for Bestway for eight days and, based on the monthly salary set out in the contract between Bestway and McLelland, was owed wages in the amount of \$1476.92. There was evidence - set out in the Determination - to support that finding, including correspondence from McLelland's immediate supervisor and the General Manager of Bestway, Mr. Bill Campbell. The delegate also found annual vacation pay was owed on that amount and that McLelland was owed \$43.01 for business costs that were incurred by him personally.
10. Bestway did not pay McLelland any monies following his termination.

ARGUMENT AND ANALYSIS

11. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

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.

12. The burden of demonstrating a breach of natural justice is on Bestway (see *James Hubert D'Hondt operating as D'Hondt Farms*, BCEST #RD021/05 (Reconsideration of BCEST #D144?04). The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03).
13. Bestway has framed its appeal as an error of law and a failure to comply with principles of natural justice. The arguments supporting these grounds of appeal, however, indicate substance of the appeal is really about findings of fact and Bestway's disagreement with those findings. A common sense and plain language orientation to an appeal - one which addresses the substance of the appeal - has been endorsed by the Tribunal (see *J.C. Creations Ltd.*, BC EST #RD317/03 (Reconsideration of BC EST #D132/03)).
14. I will, however, address the elements of the appeal as they have been framed in order to both address them and to focus the substance of the appeal.
15. Bestway says the delegate erred in law in finding a contravention of Section 18 of the *Act*. That provision states:

18. (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.

(2) an employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

16. There is no dispute in this case that Bestway terminated the employment. Bestway does not dispute that *some* monies were owed to McLelland. The appeal, in fact, sets out the amount Bestway feels it owes to McLelland. There is also no dispute that Bestway paid no monies at all to McLelland for the time he worked. As the delegate correctly points out in response to this ground of appeal, if the objective of Bestway was to avoid a contravention of the *Act*, one would expect some wages would have been paid. It is clear, however, both from the Determination and from the material on file, that Bestway was not going to pay McLelland any wages earned, except on its terms, and did not pay him anything for the work he performed. That is a clear contravention of the *Act* that cannot be excused because the amount of wages owing was in dispute. There is no error in the delegate finding a contravention of Section 18. The administrative penalty, in addition to being mandatory on finding a contravention of the *Act*, was entirely appropriate.
17. Bestway argues there was a failure to observe principles of natural justice in making the Determination. The basis for this argument is an assertion that the delegate erred in applying the facts. The particular facts alleged to be in error relate to the finding that McLelland performed work for Bestway for eight days in February 2004, commencing February 16, 2004, for eight hours on each of those days. This is the same factual dispute addressed by the delegate in the Determination in deciding whether McLelland was owed wages and, if so, in what amount. This is not a natural justice issue at all, but a continuing dispute about the facts. There is no failure to observe principles of natural justice simply because the delegate has taken a different view of the facts than what has been espoused by one of the parties.
18. The substance of the appeal is the disagreement by Bestway with factual findings and conclusions made by the delegate. That is reflected in the arguments supporting the alleged error of law and the alleged breach of natural justice. As I have indicated above, the *Act* does not allow for an appeal based on errors of fact. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law. The findings of fact made in this case are far from constituting an error of law. There was evidence before the delegate supporting the finding made, including correspondence from Mr. Campbell. The finding made was not based on an unreasonable view of the evidence as a whole.
19. No reviewable error in the Determination is shown. The appeal is dismissed.

ORDER

20. Pursuant to Section 115 of the *Act*, I order the Determination dated October 28, 2005 be confirmed in the total amount of \$2,187.62, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal