

An appeal

- by -

Estate of Dr. Robert H. Dykes

- 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/305 and 2003A/306

**DATE OF DECISION:** February 10, 2004

## DECISION

### SUBMISSIONS

E. Kim Choquette	on behalf of the Estate of Dr. Robert H. Dykes
Monique Roy	on her own behalf
William Messner	on his own behalf
Rhona Beck	on behalf of the Director

### OVERVIEW

This decision considers appeals pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by the Estate of Dr. Robert H. Dykes of two Determinations that were issued on October 22, 2003 by a delegate of the Director of Employment Standards (the “*Director*”). One Determination concluded that Dr. Robert H. Dykes had contravened Part 3, Section 18, Part 4, Section 40, Part 5, Section 45 and Part 7, Section 58 of the *Act* in respect of the employment of Monique Roy (“*Roy*”) and the other that Dr. Robert H. Dykes had contravened Part 3, Section 18, Part 5, Section 45 and Part 7, Section 58 of the *Act* in respect of the employment of William Messner (“*Messner*”) and ordered the Estate of Dr. Robert H. Dykes to pay Roy an amount of \$14040.70 and to pay Messner an amount of \$9046.28.

The Director also imposed an administrative penalty on the Estate of Dr. Robert H. Dykes under Section 29 of the *Employment Standards Regulation* (the “*Regulations*”) totalling \$1000.00.

The Estate of Dr. Robert H. Dykes challenges both Determinations on the following grounds:

- i) The Director erred in law, as neither of Roy or Messner were employees under the *Act*;
- ii) Alternatively, the Director erred in finding any work was done by either Roy or Messner;
- iii) In the further alternative, the Director erred in finding Roy was owed any additional amounts as the maximum that can be paid to an employee after the death of their employer is \$2000.00 and this amount was paid to Roy.
- iv) The wage claims of Roy and Messner are fictional, fraudulent and unsubstantiated;
- v) The decisions of the Director were biased, wilfully negligent and in breach of statutory duty; and
- vi) Evidence has become available that was not available at the time the Determination was made.

The Estate of Dr. Robert H. Dykes has requested an oral hearing on the appeal, arguing an oral hearing will prove the claims are fraudulent. Generally, the Tribunal will not hold an oral hearing on an appeal unless it is apparent the case involves a serious question of credibility on one or more key issues or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case

fairly (see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)* [2001] B.C.J. No. 1142 (B.C.S.C.)).

The Tribunal has carefully reviewed the appeal and the materials on file and has decided an oral hearing is not necessary in order to decide this appeal.

## ISSUE

The issue in these appeals is whether the Estate of Dr. Robert H. Dykes has shown there is any error in the Determinations that justifies the Tribunal cancelling both, or either, of them.

## THE FACTS

The Determination sets out the following background facts on the claims of Roy and Messner, respectively. In respect of Roy's claim, the Determination states:

Monique Roy (Roy) worked for Dr. Dykes as his receptionist and was paid \$14.00 per hour. She also worked at Dr. Dykes farm doing odd jobs such as cleaning, gathering firewood, etc. she worked for Dr. Dykes from July 18, 2000 to December 31, 2002.

Roy was requested by the Delegate to supply a copy of her hours of work to verify her request for outstanding wages as described in her complaint (attached).

Dr. Dykes passed away in November 2002. The office remained open until December 31, 2002.

Kim Choquette (Choquette) is the acting Executor of Dr. Dykes' estate. On July 24, 2003 he claimed the estate may be in bankruptcy and that he agreed to provide all documents pertaining to the bankruptcy and estate as well as the name of Dr. Dykes' bookkeeper, as Choquette did not have any payroll records. To date Choquette has not provided any information.

The Determination notes that Choquette had no objection to the claim filed by Roy.

In respect of Messner's claim, that Determination states:

The Estate of Dr. Robert H. Dykes operated a doctor's office, which falls within the jurisdiction of the Act. William Messner was employed as a handyman until December 31, 2002 at a rate of pay of \$10.00 an hour. The complaint was filed within the time allowed under the Act.

William Messner (Messner) supplied a copy of his hours of work as well as a copy of the NSF cheque dated November 1, 2002, which verifies his employment with Dr. Dykes.

Dr. Dykes passed away in November 2002. The office remained open until December 31, 2002.

Messner filed a complaint on June 27, 2003 at which time Mr. Kim Choquette was the Executor of Dr. Dykes estate and agreed wages were owed. Mediation was held between the parties, however it did not result in payment of wages and was therefore sent to investigation so a Determination could be written.

Kim Choquette (Choquette) is the acting Executor of Dr. Dykes' estate. On July 24, 2003 he claimed the estate may be in bankruptcy and that he agreed to provide all documents pertaining to

the bankruptcy and estate as well as the name of Dr. Dykes' bookkeeper, as Choquette did not have any payroll records. To date Choquette has not provided any information.

The Estate of Dr. Robert H. Dykes provided no payroll records during the investigation. Mr. Choquette suggested to the Director that Canada Customs and Revenue Agency (CCRA) might have had the employer records, but CCRA, in response to an inquiry by the Director, indicated no payroll records of the Estate of Dr. Robert H. Dykes were being held by them. Both Determinations also refer to several unsuccessful efforts made during the investigation to contact Mr. Choquette for employer records. Roy and Messner had provided a record of hours worked, which the Director indicated appeared to be reliable and which, in the absence of employer records, were accepted.

## ARGUMENT AND ANALYSIS

The burden is on the Estate of Dr. Robert H. Dykes to show an error in the Determination that justifies the intervention of the Tribunal under Section 115 of the *Act*. An appeal to the Tribunal is not a re-investigation of the complaint nor is it simply an opportunity to re-argue positions taken during the investigation or fill in perceived evidentiary gaps. It is also well settled that the Tribunal will not allow a party to fail or refuse to participate in the complaint process and then later seek to challenge findings made by the Director (see *Tri-West Tractors Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97). It is apparent from the Determination, and not denied or adequately explained in the appeals, that the Estate of Dr. Robert H. Dykes failed to fully participate in the complaint process or ensure the Director was provided with necessary documents from the Estate of Dr. Robert H. Dykes. Accordingly, its ability to challenge the Determinations is limited.

Subsection 112(1) of the *Act* 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.*

These appeals border on the frivolous.

The appeals contend the Director erred in law in deciding Roy and Messner were employees for the purpose of the *Act*, yet absolutely no evidence is provided to support that ground of appeal. On that ground, the appeal simply states: "These people were independent contractors if anything." That is insufficient to demonstrate any error in the conclusion that Roy and Messner were employees for the purposes of the *Act*. The subsequent submissions from Mr. Choquette do nothing to advance this ground for appeal. Those submissions represent no more than a series of suppositions, questions and comments. They do not show the Director was wrong.

The Estate of Dr. Robert H. Dykes says the Director erred in law by requiring more than \$2000.00 to be paid to Roy, and presumably to Messner as well. There is, however, no support provided for this argument and I am unaware of any such legal limitation.

The Estate of Dr. Robert H. Dykes says the Director failed to observe principles of natural justice in making the Determination because, it is asserted, the claims are fictional, fraudulent and unsubstantiated. There are two responses to this ground. First, there is nothing in the appeal, or in the material, that would allow a conclusion the claims made by Roy and Messner were fictional or fraudulent. They were substantiated to the satisfaction of the Director from records provided by each of them. Second, there is no evidence the Director failed to observe principles of natural justice. The Estate of Dr. Robert H. Dykes had ample opportunity to respond to the substance of the claims being made. The fact is they failed or refused to do so.

The Estate of Dr. Robert H. Dykes has indicated the appeals are grounded, in part, on fresh evidence becoming available that was not available at the time of the Determination (see paragraph 112(1)(c) of the *Act*). This ground of appeal states that “new independent verification that NO such work was ever done and that neither claimant was ever an ‘employee’ of Dr. Dykes as required by the ACT”. No such “independent verification” is provided. In that respect, the appeals document states only that, “Doctor Dykes sold the farm 5 months before dying so where were they working at.”

Fresh evidence which an appellant seeks to submit with an appeal will be tested against the following criteria:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

Applying the above criteria, there is nothing in the appeals that the Tribunal would consider to be fresh evidence. Mr Choquette has made some allegations in the appeals and in his submissions on the appeals, but no real or objective evidence has been provided.

The appeals suggest the NSF cheques written by Dr. Dykes were not authorized by him. Implicit in this suggestion is an accusation of wrongdoing against Roy and Messner, but no evidence whatsoever has been provided to establish either that the cheques were unauthorized or that Roy and Messner were involved in some kind of wrongdoing in respect of them.

There is nothing in the appeals or in the materials on file that would remotely suggest the Director was bias, negligent or in breach of her statutory duty in the investigation of the complaints and the issuing of the Determinations.

It is unnecessary to specifically address the balance of the submissions made on the appeals. Suffice to say they proceed along the same lines as those I have referred to above and are equally without merit. The appeals are dismissed.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determinations dated October 22, 2003, in the amounts of \$13504.70 payable to Roy and \$8546.28 payable to Messner and a total of \$1000 in administrative penalties, be confirmed, together with whatever interest has accrued on those amounts under Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**