

An appeal

- by -

Michelle Denise Cooke and Craig Guy McDermid carrying on business as
All Pro Cleaning
("Employer")

- 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: Sheldon M. Seigel

FILE No.: 2010A/001

DATE OF DECISION: March 17, 2010

DECISION

SUBMISSIONS

| | |
|----------------|--|
| Craig McDermid | on behalf of Michelle Denise Cooke and Craig Guy McDermid carrying on business as All Pro Cleaning |
| John Griffiths | on his own behalf |
| Alan Phillips | on behalf of the Director of Employment Standards |

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Michelle Denise Cooke and Craig Guy McDermid carrying on business as All Pro Cleaning (the “Employer”), of a Determination that was issued on December 4, 2009, by a delegate of the Director of Employment Standards (the “Director”). The Determination found that the Employer had contravened sections 18 and 58 of the *Act* and s.46 of the *Regulation* in respect of the employment of John Griffiths (the “Employee”), and ordered the Employer to pay to the Employee the amount of \$654.82. This amount included wages, annual vacation pay, and accrued interest (s.88 of the *Act*).
2. The Director also imposed administrative penalties on the Employer under Section 29(1) of the *Employment Standard Regulation* (the “*Regulation*”) in the amount of \$3,000 relating to sections 18 and 46 of the *Act*.
3. The Employer seeks a cancellation of the Determination. The Appeal Form does not indicate a ground for appeal as is customary at s.2 of the form, but Mr. McDermid does provide a written explanation of his grounds for appeal and attaches it to the Appeal Form.

ISSUE

4. The appellant did not complete s.2 of the Appeal Form indicating his grounds for appeal. The form allows the following: “Please provide your detailed explanation on a separate sheet of paper.” Mr. McDermid did provide such an explanation and I accept it as descriptive of his grounds for appeal. Accordingly, I will consider the appellant’s submissions as though they address any or all of the following options set out in s.2 of the Notice of Appeal:
 - The director of Employment Standards erred in law.
 - The Director of Employment Standards failed to observe the principles of natural justice in making the determination.
 - Evidence has become available that was not available at the time the Determination was being made.
5. The issue in this appeal is whether any of the above circumstances occurred.

ARGUMENT

6. The appellant claims that he did not have notice of the hearing that led to the Determination as he was at the relevant times “living at another address” and would like to have his evidence heard and considered before a final determination is made. Therefore, a sub-issue is whether the Employer was denied an opportunity to be heard and have his evidence considered by reason of lack of notice of the hearing.
7. Mr. McDermid also says:
 - The employee John Griffiths was always paid holiday pay.
 - Although Mr. Griffith’s final paycheck was returned NSF, Mr. McDermid paid Mr. Griffith in cash, but does not have a receipt.
 - Mr. McDermid paid for Mr. Griffith to visit a family member and was not reimbursed by the employee.
 - Mr. Griffith stole a contract with White Spot from Mr. McDermid.
8. Mr. Griffith submitted the following:
 - He never received a pay stub of any kind from All Pro Cleaning and never received any T4 slips.
 - The money Mr. McDermid paid for his family visit was returned in the next pay period. Both the advance and the return of funds were satisfied by cash transactions.
 - He was invited to bid on the White Spot contract and did not steal the contract from All Pro Cleaning.
 - A detailed list of hours worked at two locations for All Pro Cleaning during the last two weeks of February 2009, for which he was not paid.
9. The Director confirms that the Employer did not participate or respond to any notices or letters or phone calls to the Employer’s attention with respect to this matter and the Determination was made without the Employer’s participation. The Director says that the Determination identifies the efforts made to engage the appellant in resolving the complaint and “the delegate was aware of the appellant’s ongoing personal situation and submits that reasonable efforts were made to provide the appellant an opportunity to respond to the complaint.”

THE FACTS AND ANALYSIS

10. The appeal was filed in time. The Employer claims in the appeal that he had no notice of the hearing and therefore could not present his evidence contrary to that of the Employee. The Employer sets out the evidence he would have led had he participated in the hearing leading up to the Determination. This includes statements contrary to each position of the Employee. There is no supporting evidence. The Employer does not specifically address the claims that the Employee worked specific hours in the latter half of February without compensation. The Employer says he paid the Employee in cash but does not provide any receipts or records. The Employer says he always paid holiday pay to the Employee but can provide no pay stubs or company records. The Employer provides no evidence of accuracy or relevance of his claim that the Employee stole a contract from the company.

11. The Employer submits that he was staying in temporary accommodation due to an extraordinary personal situation but does not indicate whether Michele Denise Cook, his co-employer, was available to respond to the allegations. The Determination indicates that the Director attempted to contact the Employer by telephone at the business number and at two cellular phone numbers, and registered mail sent to the Employer at his address of record (the same one as process relating to the Notice of Appeal) was returned by Canada Post marked “unclaimed.” Further, a demand for Employer records was sent by registered mail and it was also returned marked “unclaimed.” Finally, a preliminary findings letter was sent to the Employer at his registered address by regular mail. The Director received no reply. The Director turned his mind to issues of procedural fairness that arose as a result of the difficulty in contacting the Employer, and in particular s.77 of the *Act* that requires the Director to make reasonable efforts to give a person under investigation an opportunity to respond. The Director concluded that he had made reasonable efforts. I agree. The Branch demanded Employer records, and these records were not provided. This is a breach of s.46 of the *Act*. Notwithstanding that the demand was returned “unclaimed” by Canada Post, s.122 of the *Act* was satisfied and the demand was deemed to have been served.
12. The Determination documents the Director’s correspondence with the Employee and the Director’s satisfaction with the credibility of the evidence provided in person by the Employee. I accept the Director’s conclusions and find that the new substantive submissions put forth by the Employer offer no persuasive arguments to the contrary. The Employer simply contradicts the evidence submitted by the Employee. These submissions are without any supporting documentation or records of the sort that the Employer is required to keep by the *Act* and *Regulation*. I find an adverse inference from the absence of supporting records in the hands of the Employer. I conclude that the payments that the Employer alleges to have made were not made.
13. I find that there was no breach of natural justice occasioned by procedures relating to the Determination, or the substance of the Determination. I find that there is no indication on the record or the Determination that the Director made any error in law. I find that no evidence has become available that was not available at the time the Determination was being made. The Appeal fails.

ORDER

14. Pursuant to section 115 of the *Act*, I confirm the Determination dated December 4, 2009.

Sheldon M. Seigel
Member
Employment Standards Tribunal