

An appeal

- by -

Patrice Denis operating as Future Paint

- 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:** Norma Edelman

**FILE No.:** 2002/563

**DATE OF DECISION:** January 21, 2003

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") by Patrice Denis operating as Future Paint ("Denis") of a Determination that was issued on October 25, 2002 by a delegate of the Director of Employment Standards.

The delegate found that Denis owed Ali Shahin ("Shahin") \$4178.08 on account of regular wages, overtime wages, statutory holiday pay and vacation pay. In his appeal, Denis says the Determination should be varied.

This appeal was decided based on the written submissions of the parties. An oral hearing is not required to decide this appeal.

### ISSUE TO BE DECIDED

Does Denis owe Shahin \$4178.08?

### FACTS AND ANALYSIS

Shahin worked for Denis from April 2001 to November 2001 as a painter.

Shahin filed a complaint at the Employment Standards Branch alleging that Denis owed him regular wages, overtime wages, statutory holiday pay and vacation pay.

In the Determination, the delegate said Denis acknowledged that Shahin worked for him at a final rate of pay of \$15.00 per hour and Denis indicated that Shahin agreed to be paid straight time when he worked overtime hours. The delegate found that even if Shahin had agreed to waive overtime pay, such an agreement was void under Section 4 of the Act. The delegate said that Denis provided some documents to show the wages paid to Shahin. Shahin also provided records of hours worked and his records of paycheques, which were the same as those presented by Denis. The delegate prepared a set of calculations based on the records provided by Denis and Shahin. She sent a copy to Denis as per his request. Her calculations indicated that Shahin was owed \$4025.92, which represents, before interest, the difference between wages earned of \$24856.28 and wages paid of \$20830.36. The delegate said that Denis failed to respond to her calculations and as a result she accepted that Shahin was owed the foregoing amount plus interest for a total of \$4178.08 and she issued the Determination in that amount.

Denis filed an appeal of the Determination on November 18, 2002. His reasons for the appeal are as follows:

I submitted the hours I had in my possession but was not asked for copy of Mr. Shehin pay cheques. After review of the cheques the total amount (net and extra hours paid cash) equal = 23856.08\$ for the period between April 13, 2001 to April 13, 2002.

Denis wants the Determination to be varied and he states he requires an oral hearing "...to clarify this file before you and take arrangements for any due amount once established." He attached copies of cheques made payable to Shahin for the period April 13, 2001 to December 11, 2001 plus a summary list of the cheques. According to my calculations, the total amount of the cheques is \$18229.28. Denis also attached a copy of Shahin's 2001 T4 slip which indicates his employment income was \$22,480.36.

The delegate and Shahin were invited to reply to the appeal.

The delegate replied that she was surprised at the information in Denis's submission. She said they had telephone conversations in which they discussed the need for all documents to be presented so that Shahin's complaint could be evaluated. She also sent Denis a letter dated May 16, 2002 requesting his response to Shahin's complaint. In this letter she asked him to submit records of the hours worked by Shahin on a daily basis, records of wages paid to him for each pay period, and any other relevant information. She said after she received Denis's records she sent her calculations to him on September 6, 2002. She gave him until September 10 to respond with his position. When she received no reply she issued the Determination.

The delegate agrees that she did not specifically request copies of cheques from Denis. Rather, she asked for all documentation on payroll and when she received the documents from Denis she presented them to Shahin. She said if Shahin had denied receiving a payment she would have requested copies of cancelled cheques but since he did not, she had no reason to question Denis's honesty by requesting such back-up evidence. She also said it is not apparent to her whether some of cheques submitted by Denis on the appeal were payments for wages. While some of the cheques indicate they were payments for wages, others are noted as payments for bus reimbursements, and some appear to be named according to the job and do not specify whether they are connected to performance of work or to expenses.

The delegate further said that Denis was given fair notice of the documents she required, he was told these documents would be used for calculating an entitlement, and he was presented with the calculations and failed to respond to her. She said if Denis paid \$3025.72 more than what he told her he paid, it is regrettable that he did not inform her of this during the time specified. She said his failure to submit all records or to attend to this matter in a timely fashion was his responsibility. She sees no reason why Denis would not have presented this evidence during the course of her investigation. She said the Tribunal's decision in *Kaiser Stables* BCEST D058/97, which states that the Tribunal will not allow a party who fails to participate fully in the investigation to submit new evidence at the appeal stage, applies in this case.

Shahin replied that he does not agree with the appeal. He further said "All documents and stub cheques were already sent to Labour Standard and it shows how much he owes me for overtime and vacation pay and etc."

Denis was given an opportunity to make a final reply. He did not do so.

The burden is on the Appellant, Denis, to show that the Determination is wrong. I am not satisfied that he has met that burden.

The Tribunal has consistently held that in the absence of a legitimate reason, evidence and information will not be considered on appeal when it could have and should have been presented to the delegate during the investigation process (see *Specialty Motor Cars* BC EST #D570/98). An appeal is not a

complete re-examination of the complaint and the Tribunal will not allow the appeal process to be used to make the case that should have been given to the delegate during the investigation process.

In this case, Denis suggests that the reason he did not provide the delegate with the information that he now presents to the Tribunal is because he was not asked for copies of Shahin's pay cheques. I do not accept that reason. The evidence before me clearly shows that he was asked to provide all records of wages paid to Shahin and any other relevant information. Denis had a full opportunity to provide copies of the pay cheques to the delegate. Even if he was not clear on what he was to submit to the delegate (and I find that to be unlikely given the delegate's May 16 letter) Denis had ample time to present the cheques to the delegate between the period after he received her September 6 letter, which set out her calculations, and before she issued the Determination on October 25. For that reason alone, the appeal is dismissed. The information provided by Denis on the appeal could have and should have been presented to the delegate in the initial investigation.

However, even if I consider the information provided by Denis, his appeal is still not successful.

Denis says he paid Shahin "23856.08\$ (net and extras hours paid cash)". The cheques he submitted to the Tribunal show Shahin was paid \$18229.28. Denis provided no evidence to confirm what cash, over and above the cheques, were paid to Shahin. Moreover, the T4 indicates Shahin was paid \$22480.36. Denis does not explain why this figure is inconsistent with the amount he claims to have paid Shahin. Indeed, one would expect that if Denis paid Shahin the amount he claims and that amount is net, the T4 should show a greater amount rather than a lesser amount given it is a gross figure. Further, as pointed out by the delegate, not all the cheques indicate that they were issued for wages. Accordingly, I am not satisfied that Denis has shown the delegate's calculations are in error. She based her calculations on material submitted by both Denis and Shahin and I see no reason to alter her calculations in any way. Based on the material before me, I am satisfied that Denis owes Shahin wages and interest in the amount of \$ 4178.08

## **ORDER**

I order pursuant to Section 115 of the Act that the Determination is confirmed.

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**Norma Edelman**  
**Adjudicator**  
**Employment Standards Tribunal**