Employment Standards TRIBUNAL

An appeal

- by -

A Z Plumbing & Gas Inc.
("A Z Plumbing")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2016A/8

DATE OF DECISION: February 12, 2016

DECISION

SUBMISSIONS

Jennifer Routley — on behalf of A Z Plumbing & Gas Inc.

OVERVIEW

1. On May 13, 2015, Mr. E. Joseph Thrane ("Mr. Thrane) filed an unpaid wage complaint under section 74 of the *Employment Standards Act* (the "*Act*") seeking payment for 103 hours representing work he claimed not to have been paid for by A Z Plumbing & Gas Inc., the present appellant ("A Z Plumbing"). Mr. Thrane's complaint was the subject of an oral hearing before a delegate of the Director of Employment Standards (the "delegate") on September 4, 2015. The delegate issued the Determination now being appealed, together with his "Reasons for the Determination" (the "delegate's reasons"), on December 4, 2015.

2. The delegate determined that A Z Plumbing owed Mr. Thrane the total sum of $1,501.50 on account of unpaid wages and together with concomitant 4% vacation pay ($60.06) and section 88 interest ($30.47), the total unpaid wage award was $1,592.03. Further, and also by way of the Determination, the delegate levied a $500 monetary penalty against A Z Plumbing based on its contravention of section 46 of the *Employment Standards Regulation* (failure to produce employment records pursuant to demand; the "*Regulation*") and a further $2,500 penalty based on its second contravention within a three year period of section 17 of the *Act* (failure to pay wages at least semimonthly).

3. A Z Plumbing appeals the Determination on the ground that the delegate erred in law (subsection 112(1)(a) of the *Act*) and, in particular, says the delegate erred in two respects: first, in awarding Mr. Thrane more than the minimum wage for his "travel time" (and, by extension, says that the vacation pay on this award should be cancelled); and second, in levying a monetary penalty for failing to produce employment records as demanded.

4. After reviewing A Z Plumbing's appeal submissions, the Determination, the delegate's reasons and the complete subsection 112(5) "record" that was before the delegate when he issued the Determination, I am satisfied that this appeal has no reasonable prospect of succeeding and, accordingly, I am dismissing it pursuant to subsection 114(1)(f) of the *Act*. My reasons for summarily dismissing this appeal now follow.

FINDINGS AND ANALYSIS

5. As recounted in the delegate's reasons, Mr. Thrane worked for A Z Plumbing as a plumber from January 2 to March 27, 2015. Each workday, he attended at A Z Plumbing's business premises, picked up a company vehicle, and then attended to his appointed rounds. Although Mr. Thrane did some work in the Fraser Valley, most of his jobs were in the greater Vancouver area. Initially, Mr. Thrane was not paid any "travel time" for the drive from A Z Plumbing's offices to the job sites. The delegate found that his travel time was compensable work since Mr. Thrane transported supplies and performed other tasks (such as picking up/dropping off cheques) while on the way to the job sites. After raising the "travel time" issue with A Z Plumbing, the firm paid him for 66 hours of travel time covering those hours for the pay period ending March 8, 2015. He was paid at the minimum wage ($10.25) rather than his contractual wage rate of $33 per hour.

6. The delegate held that Mr. Thrane was entitled to be paid at his regular contractual wage rate and thus awarded him the difference ($22.75) for the 66 hours in question – a total of $1,501.50 plus vacation pay and interest. While the delegate accepted that an employer and employee could agree to pay compensable travel time at any rate, provided it was at least the minimum wage, the delegate concluded that there was no agreement regarding the wage rate for the travel time hours and, given that it was working time, he saw no reason to do anything other than base his award on the parties' contractual agreement. The delegate's finding on this score is as follows (at page R5):

> Employers may pay a different wage rate for different work performed by a single employee, but the wage rates must be agreed between the parties. I have already found that Mr. Thrane was performing work for [A Z Plumbing] when travelling between [A Z Plumbing] and his worksites. There is no evidence that Mr. Thrane agreed to be paid minimum wage for this travel time; given that [A Z Plumbing] did not acknowledge that this time was compensable at all until early March 2015, there could not have been agreement as to a travel rate of pay for Mr. Thrane until at least that time. The only agreed rate of pay was the hourly wage recorded on Mr. Thrane's wage statements, which was $33.00 per hour when Mr. Thrane was paid for his travel time. I find that Mr. Thrane is entitled to be paid the difference between his agreed rate of pay and the minimum wage for the 66 hours of travel time totalling $1,501.50 ($22.75 per hour x 66 hours).

7. Ms. Routley, the office manager for A Z Plumbing, attacks this aspect of the Determination submitting that "[Mr. Thrane] did not ask to be compensated for travel time" when he was first hired and that when Mr. Thrane first raised the issue "I spoke with Joseph and advised him he would be paid immediately for 66 hours travel time at minimum wage and that going forward he would be paid for travel time". Although A Z Plumbing's submissions are somewhat opaque, it does *not* expressly challenge the delegate's finding that the 66 hours were compensable working hours but, rather, says that this time was fully paid at the minimum wage. If A Z Plumbing's intended position is that the 66 hours were not working hours, one wonders why it would have paid Mr. Thrane minimum wage for those hours and, in any event, the delegate's finding that the 66 hours were working hours was based on the evidence before him and I cannot say that his finding in this regard was made without a proper evidentiary foundation. Therefore, this finding of mixed fact and law does not constitute an error of law.

8. In my view, A Z Plumbing's argument that Mr. Thrane was only entitled to be paid minimum wage for the 66 hours in question is wholly without merit. First, whether Mr. Thrane did, or did not, ask to be paid for travel time is wholly irrelevant. Employees are entitled to be paid for all working hours and any agreement to the contrary (and no such agreement is alleged in this case) is void under section 4 of the *Act*. A Z Plumbing concedes there was no prior agreement regarding a different wage rate for the 66 hours in question and that the discussions regarding "payment at minimum wage" only occurred after the 66 hours had been worked. The parties did have an agreement regarding payment for working hours, namely, $33 per hour, and the delegate can hardly be said to have erred in law when he simply applied the parties' own wage agreement to the facts at hand.

9. I now turn to the appeal as it relates to the monetary penalties. There is some confusion about what particular penalty A Z Plumbing seeks to have cancelled. In its appeal materials, A Z Plumbing says that the $2,500 penalty should be cancelled but this is the penalty levied in relation to its section 17 contravention. However, its *argument* concerns the $500 penalty issued for the section 46 (*Regulation*) contravention.

10. With respect to the $2,500 penalty, the record shows that a prior determination was issued against A Z Plumbing on June 27, 2014, in relation to various contraventions, including a section 17 contravention for which it was penalized $500. Thus, the Determination now under appeal formalizes a second section 17

contravention within a 3-year period. As such, the $2,500 penalty for a second section 17 contravention within a 3-year period is mandated by subsection 29(1)(b) of the *Regulation*.

11. With respect to the section 46 (*Regulation*) $500 penalty, although A Z Plumbing concedes "documents were sent in late", it further asserts that the Mr. Thrane never informed them that the records provided to him were incomplete (although the relevance of that statement is not clear to me since the demand required A Z Plumbing to provide records to the delegate) and, finally, states: "We feel we provided the records enumerated in the 'Demand"'.

12. The "Demand for Employer Records" was issued on July 9, 2015, and required A Z Plumbing to deliver, by no later than 4:00 PM on August 14, 2015, to the Victoria office of the Employment Standards Branch, the following records: "any and all payroll records relating to wages, hours of work and conditions of employment as specified in Section 28 of the Employment Standards Act" and "records showing hours worked on each day (not a summary)" by "Joseph Thrane" for his "Entire Period of Employment". A Z Plumbing, as it concedes, did not deliver the required records by the August 14 deadline. Mr. Thrane worked through to March 27, 2015, but the records delivered did not include any records for the period from March 9 to 27, 2015. Clearly, A Z Plumbing did *not*, despite its assertion to the contrary, "provide the records enumerated in the Demand". Thus, on two accounts (it did not meet the production deadline and did not deliver all the records demanded), A Z Plumbing failed to comply with the demand. Accordingly, there is no proper basis upon which the Tribunal could lawfully cancel the section 46 (*Regulation*) penalty.

ORDER

13. Pursuant to subsection 114(1)(f) of the *Act*, the appeal is dismissed. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal