Employment Standards TRIBUNAL

An appeal

- by -

578047 B.C. Ltd. operating as Pro Gas & Heating
("ProGas")

- 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: April D. Katz

FILE No.: 2003A/280

DATE OF DECISION: February 18, 2004

DECISION

SUBMISSIONS

Eddie Lowe	on behalf of 578047 B.C. Ltd. operating as ProGas & Heating
Rod Bianchini	on behalf of the Director of Employment Standards

OVERVIEW

The Tribunal received this appeal from 578047 B.C. Ltd. carrying on business as ProGas & Heating ("ProGas") one day late. The Tribunal allowed an extension of time for the appeal to be considered on its merits. ProGas bases its appeal on three grounds, error of law, failure of the Director to observe the principles of natural justice in making the determination and evidence has become avilable that was not available a the time the Determination was being made.

The complainant, Paul Bjarnason ("Bjarnason"), was employed by ProGas. At the end of his employment he filed a complaint with the Director of Employment Standards ("Director") claiming unpaid wages from October 3, 2002 to October 11, 2002. The Director made a Demand for Employer Records from ProGas and notified ProGas of a date for a voluntary mediation of the dispute. ProGas advised the Director's office that the owner of ProGas could not attend on the original date set for the mediation. A Director's representative who spoke to the owner of ProGas indicated that the next available date for mediation was in mid May 2003. The owner of ProGas advised the representative of the Director that he was out of the country after April 25, 2003 until June 6, 2003. The absence of a ProGas respresentative for the period April 26, 2003 to June 6, 2003 inclusive was noted on the Director's file.

ProGas was sent two additional notifications of mediation dates and someone set the mediation for May 21, 2003. The mediation proceeded in the absence of a ProGas representative. On May 23, 2003 the Director's office sent ProGas a Demand for Employer Records for the period September 22, 2003 to October 17, 2003 and a Notice of Complaint Hearing for Monday, June 10, 2003 at 9 AM. The Demand for Employer Records required the information to be delivered to the Director's office no later than 4:30 PM on June 6, 2003. All the correspondence with ProGas was sent by registered mail.

After the hearing the Director's delegate issued a Determination based on the "unchallenged evidence and testimony" of Bjarnason. The Determination concluded Bjarnason was owed $1067 in wages, overtime and vacation pay for wages earned from September 23, 2002 to September 27, 2002 inclusive, September 30, 2002 to October 5, 2002 inclusive and October 7, 2002 to October 11, 2002 inclusive for a total of $1219.50 which included $121.50 of overtime on Saturday, October 5, 2002. Vacation pay of $48.78 was found to be owing on the $1219.50. The Determination found that ProGas had advanced Bjarnason $240 in cash and this was deducted from the total owed.

ProGas bases the appeal on the Director's decision to expand the wage award to a period when Bjarnason was unknown to ProGas, September 23, 2002 to October 2, 2002.

ProGas submits that the Director knew that ProGas could not respond before June 10, 2003 when the owner returned to the office. The effect of the Director's decision to proceed with this complaint, through

mediation and hearing was an error of law and a failure to observe the principles of natural justice in making the determination.

Had the owner of ProGas received a copy of the Director's Demand for Employer Records showing the expanded period beyond Bjarnason's original claim, ProGas indicates they could have provided WCB documentation and evidence from the site supervisor and office staff which showed that Bjarnason's first day of work was October 3, 2002 and that he stopped working on October 10, 2002 due to an injury. The result of this information would have eliminated a claim for overtime as well as wages for days not worked. In addition ProGas had provided signed receipts from Bjarnason showing that he had received $540 in pay advances. ProGas disputes Bjarnason's claim that he received $120 as a cash advance on October 7, 2002 not the $420 on his signed receipt.

The appeal proceeded by way of written submissions from the Appellant and the Director.

ISSUES

Is there evidence to support the conclusion that the Director erred in law or failed to observe the principles of natural justice in making the determination, or, is there evidence which has become available that was not available at the time the determination was being made that should be considered?

ARGUMENTS

ProGas argues that the Director erred in law in expanding the period of the claim without notice to ProGas. The Director failed to provide ProGas with an opportunity to dispute Bjarnason's new claims and to defend ProGas's position as required by section 77 of the *Employment Standards Act* ("*Act"*). ProGas argues that the Director's office was notified that ProGas could not participate in a mediation or hearing from April 26, 2003 to June 10, 2003 due to the owner of ProGas being out of the country. ProGas argues that the Director breached section 77 of the *Act* when the Director proceeded with the mediation and notification of a hearing when the Director knew ProGas would not be aware of the proceedings and therefore could not participate.

ProGas argues that there was evidence from witnesses, a site supervisor and co-workers and documentation, including Workers Comensation Board documents, which proves that Bjarnason did not work the hours he alleged he worked during the mediation and hearing that were not part of the original claim. ProGas submits that the Director failed to observe the principles of natural justice in not providing an opportunity for ProGas to submit this evidence.

The Director's Delegate's argues that reasonable efforts to contact ProGas were made. The Delegate made the Determination based on the best information that was available and that the Tribunal should not consider arguments or evidence that could have been provided to the Director at the mediation or complaint hearing stage.

FACTS

Many of the facts in this appeal are in dispute. The following documents both the undisputed and disputed facts.

The Complaint and Information Form given to ProGas by Bjarnason on November 4, 2002 claimed he was not paid in full for the 63 hours at regular wages or $567 and vacation pay of $22.68 which were earned from October 3, 2002 to October 10, 2002. Bjarnason made no claim for overtime pay. The Form stated that $240 had been advanced in cash to Bjarnason by ProGas. The Request for Payment Form completed by Bjarnason in the self help kit stated regular wages were owed from October 3, 2002 to October 14, 2002 at the top but provided details of hours worked from October 3, 2002 to October 5, 2002 inclusive and from October 7, 2002 to October 10, 2002 inclusive with a 4 hour claim for October 11, 2003 crossed out.

Bjarnason's oral evidence to the Director at the hearing on June 10, 2003 was that he started his employment with ProGas on September 23, 2002 and worked until October 11, 2002 when he reported to work with a claim of being injured on October 10, 2002. The Determination awarded Bjarnason wages and overtime from September 23, 2002 to October 11, 2002.

ProGas's evidence in the material filed with this appeal is that Bjarnason repsonded to an advertisement placed on September 25, 2002. He was interviewed for the job on October 2, 2002 and started on October 3, 2002 when he completed his tax forms and human resources documents for ProGas. Copies of these completed forms were provided to the Director in March 2003.

On March 7, 2003 the Director's office spoke to ProGas and noted that ProGas's position was that Bjarnason was employed for less than a week. The Director's office faxed ProGas a self help kit on March 7, 2003. The Director's office contacted ProGas on March 10, 2003 and the owner indicated he was still reviewing the matter. The Director's office left a message for the owner on March 12, 2003. ProGas promised to fax the employment records for Bjarnason and did fax copies of three pay advances, one for $60 on October 3, 2002, one for $60 on October 4, 2002 and one for $420 on October 7, 2002, plus a copy of Bjarnason's TD1 form signed on October 3, 2002.

Bjarnason's evidence at the mediation on May 21, 2003 and the hearing on June 10, 2003 was that he received two advances of $60 for which he signed receipts. In addition Bjarnason says he signed a receipt for receiving $120 in cash on October 7, 2002 and submits that the receipt submitted to the Director by ProGas stating he received $420 creating a '4' from a '1' with a different pen. Bjarnason's evidence at the hearing was that the receipt was altered after he signed it. He relied on his complaint forms which show that he has consistently stated he received $240 in cash advances.

On March 18, 2003 ProGas was sent a Demand for Employer Records by registered mail requesting employer records for the period September 22, 2002 to October 17, 2002 for Bjarnason. No payroll records were provided. The Director's delegate relied on the hours submitted by Bjarnason in the Determination in the absence of any payroll records from ProGas.

ProGas was notified of a mediation meeting scheduled for April 1, 2003. ProGas contacted the Director's office in March to indicate that Pro Gas's witness was unavailable on April 1, 2003 for a mediation and asked for another day in April. ProGas's evidence is that the Director's office called ProGas on about March 27, 2003 and indicated that the next available date was in May 2003. From the Director's file notes on April 14, 2003 ProGas advised the Director's office that Bjarnason worked for one week and filed a Workers Compensation Claim on October 10, 2002. From the Director's notes on file, in the same conversation, ProGas advised that the owner was out of the country from April 26, 2003 to June 6, 2003.

The Director sent notification of the claim and the process to ProGas by registered mail on March 18, 2003, April 1, 2003 and May 1, 2003. On May 5, 2003 the Director received a copy of Bjarnason's WCB claim form from ProGas showing Bjarnason was injured at work on October 10, 2002.

The Director's office sent Notices of Mediation to ProGas on March 21, 2003 and May 1, 2003. The Director proceeded with a mediation on May 21, 2003.

On May 23, 2003 the Director's Delegate sent a Notice of Complaint Hearing for 9 AM on June 10, 2003 to ProGas and a Demand for Employer Records for Bjarnason for the period September 22, 2002 to October 17, 2002. The Employer Records were to be provided no later than 4:30 PM on June 6, 2003. The Director proceeded with the hearing at 9 AM on June 10, 2003.

The owner of ProGas left Cairo to return to Vancouver on June 2, 2003. ProGas did not submit any additional evidence or documents on June 6, 2003 or participate in the hearing on June 10, 2003. ProGas was not represented at the mediation or the hearing. The Determination is dated August 11, 2003 and this appeal was submitted on September 19, 2003.

LAW AND ANALYSIS

The burden of proof in an appeal is on the appellant, in this instance, ProGas, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. The Tribunal has consistently said that an appeal is not a re-investigation or rehearing of the complaint nor is it intended to be simply an opportunity to argue positions previously taken. 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 made.

The first ground of this appeal is that there was an error of law. ProGas argues that that the error of law was that the Director breached section 77. Section 77 is set out below.

> **Opportunity to respond**
>
> **77.** If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

This section sets out a principle of natural justice which effectively combines the first two grounds of appeal.

The parties agree that ProGas did not attend the voluntary mediation meeting on May 21, 2003 or the hearing on June 10, 2003. It is unclear who at ProGas confirmed the May 21, 2003 date with the Director's office in the absence of the owner but it seems likely that the same person sent the WCB document which arrived in the Director's office on May 5, 2003. The legal question is whether ProGas had an 'opportunity to respond' to Bjarnason's claim. The fact that ProGas did not attend the mediation

or the hearing does not necessarily mean that ProGas did not have an 'opportunity to respond' to Bjarnason's claim.

Bjarnason's evidence was that he gave a copy of his original claim to ProGas on November 4, 2002. Bjarnason indicated he was claiming wages from October 3, 2002 to October 10, 2002.

On March 18, 2003 the Director sent a Notice of Mediation Session and Demand for Records by registered mail to ProGas. In the Demand for Records the claim period September 22, 2002 to October 17, 2002. The employer records were to include the date employment began and ended, the employee's wage rate, whether paid hourly, salary, piece rate or commission, the hours worked by the employee each day, the employee's gross and net wages for each pay period, each deduction made from the employee's wages and the reason for it, each statutory holiday taken by the employee and the amount paid for each holiday, the dates of the annual vacation(s) taken and the amount paid for each vacation. All the employer records were to be produced no later than March 28, 2003. ProGas sent the Director a copy of the cash advance receipts dated October 3, 2002, October 4, 2002 and October 7, 2002 and Bjarnason's TD1 form. No payroll records were provided.

In the March 18, 2003 package ProGas was sent a copy of Factsheets entitled "Employment Standards Mediation", "Employment Standards Hearings", and "Enforcement Measures and Penalties". The Factsheets included information on how to obtain more information and a toll free telephone number. ProGas's evidence was that ProGas did speak to the Director's office in late March after this information was sent.

In support of this appeal ProGas provided evidence to dispute the finding of fact that Bjarnason was employed by ProGas from September 23, 2002 to October 2, 2002. Based on the evidence presented I am satisfied that if the Director's Delegate had this evidence the Delegate might have reached a different conclusion in the Determination. However, as has been stated in previous decisions the *Employment Standards Act* does not allow an appeal to be based on an error on the facts alone. The Tribunal will not substitute its opinion for that of the Director without some basis for doing so. The burden is on ProGas to demonstrate that there are grounds for dismissing or varying the determination.

In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No. 2275 (C.A.) the B.C. Court of Appeal set out the elements of 'error of law' as follows:

(a) a misinterpretation or misapplication of a section of the Act;

(b) a misapplication of an applicable principle of general law;

(c) acting without any evidence;

(d) acting on a view of the facts which could not reasonably be entertained; and

(e) exercising discretion in a fashion that is wrong in principle.

Firstly, the issue arises of whether ProGase was given a reasonable opportunity to respond to Bjarnason's claim. The Director communicated by telephone with ProGas on March 7, 2003, March 10, 2003 and March 12, 2003. The Director then sent the Demand for Employer Records for the period September 22, 2002 to October 17, 2002 and Factsheets about the process of mediation and complaint hearings as well

as enforcement measures. The deadline of March 28, 2003 for providing the information was well prior to the owner's departure from the country. The Factsheets made the owner aware of the process of the complaint and the likelihood that a mediation date and hearing could take place unless the matter was resolved.

ProGas chose to arrange its affairs so that the Notices from the Director were not attended to when the owner was present as well as when he was absent from the country. The Director's Demand for Records sent on May 23, 2003 restated the relevant employment period of interest to be September 22, 2002 to October 17, 2002. The owner did return to the country on June 2, 2003, a week before the hearing. ProGas could have provided the documentation provided with this appeal, including the evidence from employees and co-workers for consideration at the hearing, prior to the deadline of 4:30 PM on June 6, 2003. The owner of ProGas could have attended the hearing on June 10, 2003 to respond to Bjarnason's claim.

I find that the Director made more than reasonable efforts to give ProGas an opportunity to respond to Bjarnason's claim by telephone, in writing and in person. I find that the Director observed the principles of natural justice in making the determination.

At the mediation and the hearing the Director's Delegate heard Bjarnason's evidence in the absence of ProGas and relied on the undisputed evidence presented. The Determination sets out all the evidence provided and the conclusions reached based on that evidence. I find that there was evidence in support of the conclusions reached and that the Determination's view of the facts could be reasonably entertained in the absence of any contrary information. ProGas has not raised any misapplication of a wrong principle which would support a finding of error of law. I find no evidence to support the conclusion that the Director erred in law.

The final ground of appeal is that evidence has become available that was not available at the time the Determination was being made. Are the statements from co-workers and other employees new evidence? The language of this ground of appeal restricts the type of evidence which the Tribunal may consider. The intent of the restriction is to support the finality of the Director's Determinations by not allowing a party to fail to present its whole case before the Director and then raise evidence, which could and should have been put before the Director, on Section 112 appeal before the Tribunal. The intent of the Act in this respect is set out in Section 2(d) "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act" with the further intention of providing "relatively quick and cheap means of resolving employment disputes" under the Act. Allowing the Tribunal to consider evidence which could have been prepared for or delivered to the Director would undermine the purpose of the Act with needless appeals.

Equally clearly, however, it is essential to the purposes of the legislation that parties who have been denied a chance to be heard not be prevented from proving a breach of procedural fairness on appeal by not being able to submit the relevant evidence in support. To not allow a party to do so would put them in a "catch 22" situation, and would be inconsistent with the purpose of the Act to provide fair as well as efficient procedures. Adducing evidence to show a breach of procedural fairness is a very different matter from adducing evidence for the first time on appeal for the purpose of having the truth of the evidence accepted "on the merits".

This distinction, which reinforces the fairness requirement in the Act, is consistent with elementary administrative law principles. Even on judicial review, courts allow "new evidence" to be tendered to

show jurisdictional error such as a breach of procedural fairness: *Evans ForestProducts Ltd. v. British Columbia (Chief Forester)*, [1995] B.C.J. No. 729 (S.C.). Brown and Evans, in *Judicial Review of Administrative Action in Canada* (2003) at pp. 6-56, 57.

The new evidence presented with this appeal goes to the merits of the Determination and not to a denial of procedural fairness. The new evidence is from co workers and supervisors who could have given their evidence to the Director prior to the hearing or at the hearing. There is not new relevant documentary evidence that was created after the hearing on June 10, 2003.

It is often said that the rationale for procedural fairness lies in both the procedural justice a person affected by an adverse decision is entitled to have and in its ability to ensure that a decision maker can get to the truth and thus make a sound decision. I find that ProGas was given an opportunity to provide the relevant evidence for the Determination and did not do so. The fact that ProGas did not submit all its evidence was within ProGas's control and is not a basis for altering the Determination on appeal.

CONCLUSION

Based on the evidence provided and the conclusions reached the Determination is confirmed.

ORDER

Pursuant Pursuant to section 115 of the Act, I order that the Determination in this matter, dated August 11, 2003 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal