

An appeal

- by -

Wood Brothers Restorations Ltd.
("Wood" or "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

ADJUDICATOR: Paul E. Love

FILE No.: 2001/823

DATE OF DECISION: January 21, 2002

DECISION

OVERVIEW

This is an appeal by an employer, Wood Brothers Restorations Ltd. (“company”), from a Determination dated October 30, 2001 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”), concerning Harnek Kahlon. The Delegate made a Determination based upon time sheets and other information provided by Mr. Kahlon, as the company failed to participate in the investigation. After the Determination was issued, the company filed an appeal alleging that Mr. Kahlon was an independent contractor, who was terminated for cheating on time cards and stealing materials. These serious allegations were not supported by any evidence. If a party fails to participate in an investigation, the Delegate will not have erred in the findings made on the basis of evidence supplied by a party who contributed evidence. Here there is no allegation that the Delegate failed to accord a reasonable opportunity to the company to participate in the investigation, nor is any explanation offered by the company for its failure to participate in the investigation. I therefore confirmed the Determination.

ISSUE:

Did the Delegate err in determining that Mr. Kahlon was an employee entitled to wages?

FACTS

I decided this case after considering the written submission of Wood Brothers Restorations Ltd. and Harnek Kahlon.

The Delegate received a complaint from Harnek Kahlon that he was not paid regular wages, overtime, statutory holiday pay and vacation pay by Wood Brothers Restorations Ltd. (“company”). The information provided to the Delegate by Mr. Kahlon was that he was employed as a labourer at a rate of \$16.00 per hour from June 5, 2000 to August 15, 2000. The Delegate considered the time cards of Mr. Kahlon and issued a Determination in the amount of \$1,920.30 for regular wages, overtime, statutory holiday pay and vacation pay, plus interest in the amount of \$160.94, for a total of \$2,081.24. Another Delegate assessed a zero dollar penalty against Wood Brothers Restorations Ltd. because the company failed to pay wages in accordance with the *Act*.

The Delegate had some contact with the company accountant who indicated that Mr. Kahlon was not an employee but a sub-contractor. The company, however, declined to participate in the investigation by failing to respond to telephone messages left on the company’s telephone machine, personal visits made to the company’s office by the Delegate, with a business card of

the Delegate taped to the door. The Delegate made a demand in writing for records, which was sent to the company's office. The demand was returned unclaimed.

Employer's Argument:

The company filed an appeal form on November 22, 2001 which alleged that

“Full facts have not been considered by the Delegate of the Director. We have not connected.”

The appellant indicated:

“We meant to provide all relevant information/explanation and documents”

The Appeal form also included the following information concerning the Employer's case:

1. Mr. Kahlon was not an employee - not on the payroll. He brought his own tools and helpers. He was an independent contractor.
2. He was fired for stealing and cheating on time cards.
3. Full details will be provided at the Hearing.

I note that the Tribunal sent a letter to all interested parties including Wood Brothers Restorations Ltd., dated November 26, 2001, which stated in part:

The Tribunal will assign an Adjudicator to decide this appeal. The Adjudicator may decide this appeal based solely on written submissions or an oral hearing may be held.

The Tribunal informed the parties by letter dated January 11, 2002 that the appeal would be decided based on the written submissions received from the parties.

Employee's Argument:

Mr. Kahlon submits that he was a worker, and not a business owner. He denies the accusation of cheating on hours.

The efforts set out by the Delegate to contact the company are set out in the Determination. There is a sufficient basis for me to conclude that the company failed to participate in the investigation, and that the Delegate accorded to the company a reasonable opportunity to participate in the investigation.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case the company, to show that there was an error in the Determination such that I should vary or cancel the Determination. The previous decisions before this Tribunal indicate that a party cannot lie in the weeds, fail to participate in an investigation, and then introduce, what is in effect new evidence to the Tribunal which should have been provided to the Delegate: *Tri-West Tractor Ltd., BCEST #D268/96*.

The company has advanced no reason why it chose not to participate in the investigation. It makes no allegation that the Delegate failed to accord to it a reasonable opportunity to participate in the investigation of the complaint. I have no hesitation in concluding that the company failed to participate in the investigation.

The company makes a rather serious allegations that Mr. Kahlon was dismissed because of “stealing” materials from a job site, and submitting false hours on his paycheque. I note that even if the company established these facts, these claims could not be set off against a wage claim found to be properly due and owing by the Delegate or by the Tribunal in a Determination or appeal decision under the *Act*.

The Employer also submitted that it “understood that a person hired as contract labour does not receive overtime, vacation pay or holiday pay”. If the company intended to argue that Mr. Kahlon was not an employee, but an independent contractor, it should have participated in the investigation and made that submission to the Delegate, and provided records to the Delegate. This Tribunal performs an “error correction” function, correcting errors that the Delegate made in the investigation that would make a difference to the outcome. It can hardly be claimed that the Delegate erred when the Employer failed, to participate in the investigation.

The Delegate was entitled to determine this case upon the information which it had in his possession. There appears to be evidence in this case supporting that Mr. Kahlon was an employee who worked for an hourly wage of \$16.00. Further the company submitted no evidence with its appeal submission, and the submission dated December 18, 2001, with attachments, does not assist me in determining error in the Determination. There is no information presented by the company which demonstrates any error in the amount calculated by the Delegate to be due and owing.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated October 30, 2001 is confirmed, with interest in accordance with s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal