

An appeal

- by -

Arbutus Excavating Ltd.
("Arbutus")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2005A/12

DATE OF DECISION: March 18, 2005

DECISION

SUBMISSIONS

R. W. Range	on behalf of Arbutus Excavating Ltd.
Luke Krayenhoff	on behalf of the Director of Employment Standards
Jason Graham	on his own behalf

OVERVIEW

This is an appeal by Arbutus Excavating Ltd. ("Arbutus"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued December 23, 2004.

Jason Graham worked for Arbutus as a trucker. He alleged that Arbutus contravened the *Act* in failing to pay him overtime and vacation pay.

The Director's delegate held a hearing into Mr. Graham's complaint on November 29, 2004, and determined that Arbutus had contravened Section 37.3 of the *Employment Standards Act* in failing to pay Mr. Graham overtime wages for truck drivers, and associated vacation pay. He concluded that Mr. Graham was entitled to wages, vacation pay and interest in the total amount of \$1,701.79. The delegate also imposed a \$500 penalty on Arbutus for the contravention, pursuant to section 29(1) of the *Employment Standards Regulations*.

Arbutus contends that the delegate failed to observe the principles of natural justice in making the Determination.

Arbutus did not seek an oral hearing, and I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUE

Did the Director's delegate fail to observe the principles of natural justice in making the Determination?

THE FACTS

Mr. Graham worked for Arbutus as a short haul trucker. He completed time cards on a regular basis. In the hearing, he referred the delegate to those time cards, and sought to have Arbutus apply overtime rates for short haul truckers to the hours he worked.

Arbutus provided the delegate with payroll records, including Mr. Graham's original time cards and wage statements showing hours worked and the hourly rate of pay. Arbutus took the position at the hearing that Mr. Graham was not entitled to overtime because he should not have been paid for the hours he was originally paid. Arbutus contended that Mr. Graham had exaggerated the hours he recorded on his time

cards. Mr. Range argued that Arbutus had not disputed Mr. Graham's time sheets at the time he was paid because Mr. Graham threatened company staff with violence if he was not paid. Mr. Range supplied the delegate with affidavits in support of this submission.

The delegate found that Mr. Graham had completed the time cards and paid straight time for the hours recorded on those cards. He concluded that Arbutus had failed to persuade him that many of the hours recorded should not have been paid. He determined that, even if the hours had been paid only under duress, Arbutus' remedy was to not pay the wages and terminate Mr. Graham's employment, and seek the assistance of the police.

The delegate reviewed the time cards, and determined that overtime wages were owed. He calculated the amount owing to Mr. Graham based on the provisions of section 37.3(3) of the Act.

ARGUMENT

In his letter of appeal, Mr. Range says that Mr. Graham has been overpaid for unnecessary hours. He says that "Arbutus felt that Jason needed the money, since he came to work in Victoria from Campbell River and everyone has the right to work."

Mr. Range also says that had Mr. Graham "not been going through emotional problems, he would have been terminated and the wages would not have been paid under duress".

The delegate submits that Arbutus' arguments are the same as those made at the hearing, and that the Determination should be upheld.

Mr. Graham's submission addresses the allegations made by Mr. Range in his letter of appeal. Because it is not clear to me whether Mr. Graham made similar submissions before the delegate, I have not set those submissions out here, as they may constitute new evidence. Suffice it to say, the essence of Mr. Graham's submission is to have the Determination upheld.

In a reply submission, Mr. Range makes further factual arguments and says that "the decision of the director was unfair and the actual facts have already been submitted."

DECISION

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination;
or
- (c) evidence has become available that was not available at the time the determination was being made

The burden is on the appellant to demonstrate, with persuasive and compelling evidence, that the delegate failed to observe the principles of natural justice.

Principles of natural justice are, in essence, procedural rights that ensure parties know the case against them, the right to respond, and the right to be heard by an independent decision maker.

Arbutus does not suggest in its appeal letter that it was denied a fair hearing, and there is nothing apparent on the face of the record that persuades me there was a breach of the principles of natural justice. Mr. Range was present at the hearing, and was aware of the case he had to meet. He submitted the documents relied upon by the delegate in arriving at the Determination. Mr. Range was also given the opportunity to ask questions of Mr. Graham, and to respond to what Mr. Graham had to say.

I am unable to conclude that there is any basis for this ground of appeal.

I have also considered whether Arbutus has demonstrated any other basis in law for interfering with the delegate's conclusions. I conclude that it has not.

Although Arbutus did not deny the accuracy of its own records at the hearing, it contended that Mr. Graham should not have been paid as much as he was. The delegate concluded that because Arbutus accepted Mr. Graham's time sheets as accurate, it was not open for it to dispute those time sheets as a basis for not paying him overtime wages after the complaint was filed. He determined that Arbutus had other remedies at the time, and because Arbutus had not availed itself of those remedies, the records would be accepted as accurate.

Arbutus' submissions are identical to those made at the hearing. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate. Although it is clear Arbutus is dissatisfied with the Determination, I have no basis to conclude that it is in error.

The appeal is dismissed.

ORDER

I Order, pursuant to section 115 of the Act, that the Determination, issued December 23, 2004, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal