

An appeal

- by -

Balbir Verma
(“Mr. Verma”)

- 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: Carol L. Roberts

FILE No.: 2014A/32

DATE OF DECISION: May 13, 2014

DECISION

SUBMISSIONS

Balbir Verma

on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Balbir Verma has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 7, 2014.
2. On May 24, 2013, Mr. Verma filed a complaint with the Director alleging that his former employer, Calderon’s Painting (“Calderon”) contravened the *Act* in failing to pay regular wages, overtime and annual vacation pay. Mr. Verma worked for Calderon as a painter from April 24, 2013, until May 10, 2013.
3. The Director’s delegate found that Calderon had not contravened the *Act*, that Mr. Verma had been paid all wages to which he was entitled and decided no further action would be taken.
4. Mr. Verma contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
5. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) provides that the Employment Standards Tribunal (the “Tribunal”) may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
6. These reasons are based on Mr. Verma’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 (1), the Respondent will and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

FACTS

7. The facts are drawn from the Determination and the section 112(5) “record”.
8. On October 7, 2013, a delegate of the Director sent a letter to the parties reminding them of the hearing on November 12, 2013, and requested that they provide evidence they would be relying on at the hearing. Having received no information from Mr. Verma, a delegate of the Director attempted to contact him by telephone and discovered that his number was no longer in service. A delegate then sent Mr. Verma an e-mail. Although the Determination is unclear, I infer the e-mail was sent in an attempt to make contact with Mr. Verma and remind him of the upcoming hearing.
9. On November 4, 2013, Mr. Verma telephoned the delegate and indicated that he had no additional information to provide. He also said that he had started a new job and was unsure if he could attend the hearing on November 12, 2013. According to the delegate, Mr. Verma was told that a decision would be made on the evidence available, including Mr. Verma’s testimony, at the time of the hearing. Mr. Verma advised that he would inquire with his boss about appearing and would call back.

10. Mr. Verma did not call back and did not appear at the hearing. When contacted by a delegate at the time of the hearing, Mr. Verma indicated that he was aware of the hearing but would not be attending because of his new job. The delegate then asked whether Mr. Verma would attend by telephone. Mr. Verma said that he would not because of his work, but that he would appear at 3:00 p.m. The delegate explained that the Employer's representative was present and ready to proceed. Mr. Verma then sought to have the hearing re-scheduled for 1:00 pm that day. The delegate advised Mr. Verma that she would decide whether or not to proceed. After reviewing the steps the Branch had taken to advise Mr. Verma of the date and time of the hearing and his responses, the objections of the Employer and after considering the purposes of the *Act*, the delegate decided she would determine Mr. Verma's complaint on the information he had provided to date as well as on the Employer's evidence.
11. After considering the documentary evidence provided by Mr. Verma and the evidence provided by Calderon, along with the oral testimony of Jose Luis Calderon, Calderon's owner, the delegate found Mr. Calderon's evidence to be the most persuasive. She concluded that Calderon's documentary evidence was the best evidence. She also found Mr. Calderon's oral evidence to be consistent with all the documentary evidence, including the documentary evidence provided by Mr. Verma.
12. The delegate found Calderon's evidence to be compelling, persuasive and consistent and concluded that Mr. Verma had been paid all wages he was entitled to.

ARGUMENT

13. Mr. Verma acknowledged that he was aware of the date and time of the hearing and that he submitted all of his relevant information to the Branch in advance of the hearing. He further acknowledged that he spoke to a Branch officer and indicated he would use his best efforts to attend the hearing on the date set.
14. Mr. Verma says that, at the time of the hearing, a Branch officer telephoned him to ask why he was not at the hearing. He acknowledged that, during that conversation, he asked to have the hearing time changed to accommodate his work schedule. He says he was told that the delegate would proceed with the hearing in his absence.
15. Mr. Verma says that the Determination came as a "great shock" to him and argues that the delegate failed to fairly consider the documents he submitted in advance of the hearing.

ANALYSIS

16. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
17. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds. I find that Mr. Verma has not met that burden.

18. Much of Mr. Verma's submission is a response to the evidence of Mr. Calderon, as set out in the Determination. I have not summarized any of those comments as they do not relate to any of the statutory grounds of appeal.
19. Mr. Verma had every opportunity to attend the hearing and failed to do so. He sought an adjournment at the last minute with full knowledge of the consequences of a failure to appear. He was aware the delegate would make a decision based on all the information she had before her at the time of the hearing. That Mr. Verma is shocked by the result is not a ground for appeal.
20. As the Tribunal has repeatedly said, an appeal is not intended to be an opportunity to submit evidence and argument that was not provided during the complaint process hoping to have the Tribunal review and re-weigh the issues and reach a different conclusion.

Error of Law

21. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
22. The delegate considered all the evidence before her and found Mr. Calderon's evidence to be more credible and persuasive. Having reviewed the record, the Determination and the submissions, I am not persuaded that the delegate made any palpable or overriding error, reached a clearly wrong conclusion of fact or acted without any evidence or on a view of the evidence that could not be entertained. In my view, the Determination was both reasoned and based on appropriate law.
23. I dismiss the appeal.

ORDER

24. Pursuant to section 114 (1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *Act*, the Determination, dated February 7, 2014, is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal