

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Rainbow Angels Home Service Inc.

("Rainbow" or the "employer")

of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth W m. Thomicroft

FILE No.: 98/637

DATE OF HEARING: February 1st, 1999

DATE OF DECISION: February 5, 1999

DECISION

APPEARANCES

Mae Esmaili for Rainbow Angels Home Service Inc.
 Sylvester Fleming on his *own* behalf
 Bernard T. Gifford for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Rainbow Angels Home Service Inc. ("Rainbow" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the "*Ad*") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 14th, 1998 under file number 084-033 (the "Determination").

The Director determined that Rainbow owed its former employee, Sylvester Fleming ("Fleming"), the sum of \$946.44 on account of unpaid wages and interest.

This appeal was heard at the Tribunal's offices in Vancouver on February 1st, 1999 at which time I heard evidence and submissions from Moe Esmaili (an officer, director and shareholder of Rainbow) on behalf of the appellant and from Fleming on his own behalf. The Director's delegate elected not to present any evidence and by way of submissions conceded that, at a minimum, the Determination should be varied.

FACTS AND ANALYSIS

Rainbow, a firm founded and operated by Moe Esmaili ("Esmaili"), provides janitorial and other services (such as moving, painting and repairs) to its clients. Esmaili testified that he seeks employees through Canada Employment Centres and generally pays wages of not more than \$8 per hour. Rainbow has offices located in Sidney and Burnaby, B.C.

In early November 1997, Fleming dropped by the Burnaby office and spoke with Esmaili. According to Esmaili, Fleming stated that he was an experienced carpet cleaner who was looking for work. Fleming indicated that on his last job he was paid by way of commissions and earned between \$800 to \$1,000 per month. Esmaili offered Fleming a job at \$8 per hour and Fleming worked from November 14th through November 20th, 1997, inclusive. On his last day of work, Fleming stated that he had to return to Newfoundland because his grandmother was ill and asked for his paycheque; Fleming never returned to work.

Fleming's evidence was that he first learned about Rainbow by scanning the yellow pages for carpet cleaning firms. Rainbow's listing caught his eye because Rainbow's Burnaby office was near his residence. Fleming says that he dropped by the office on November 7th and was immediately offered a job at \$10 per hour. Fleming says that he worked from November 8th until November 19th, 1997 doing moving and carpet cleaning tasks and that he worked a total of 84.5 hours during this period. Fleming acknowledges having received a cheque, dated November 20th, 1997, for \$246 which represented 32 hours at \$8 per hour less deductions for the Canada Pension Plan and Unemployment Insurance. Fleming says that he quit his employment due to his frustration over not having been paid all of the wages he earned.

Very obviously, this case turns on the relative credibility of Fleming and Esmaili. Unfortunately, neither party has adequate documentary evidence which, of itself, confirms their position. However, to the extent that there are documents, in my view, these documents tend to corroborate the employer's, rather than Fleming's, position.

The employer's payroll records confirm that Fleming only worked 32 hours during the period November 14th to 20th, 1997. The employer says that it hired Fleming at an hourly rate of \$8; Fleming, on the other hand, filed a complaint claiming his hourly rate was \$10 but then told the delegate (and on several occasions reconfirmed this position) that his hourly rate was \$12. Fleming has not provided, in my view, an adequate (or indeed, any) explanation for this discrepancy.

The discrepancy with respect to the hourly wage rate is not the only problem with Fleming's version of events. It is now clear that Fleming worked for Rainbow during the month of November--there is, of course, a dispute between the parties regarding the number of hours Fleming worked in November. However, Fleming's original complaint (filed with the Employment Standards Branch on January 2nd, 1998) stated that he was employed from July to August 1997; again, Fleming has not provided a satisfactory explanation for this inconsistency in his evidence.

Further, while Fleming now claims that he worked 84.5 hours, his original complaint claimed he worked 40 hours per day (obviously, some sort of error), 6 to 7 days per week, and 56 hours per week. His complaint also stated that he was "paid cash no deductions". Clearly, based on the evidence before me, including Fleming's own admissions, the information contained in his complaint is totally inaccurate, misleading and unreliable. For example, Fleming's present assertion that he worked 84.5 hours over a 2-week period averages to about 42 hours per week, not the 56 hours per week he originally claimed in his complaint. His complaint says that he was paid in cash whereas he now admits to having received one, and only one, payroll cheque--for an amount net of CPP and UIC deductions.

Fleming testified that when he received the \$246 cheque on November 20th, he never complained about a shortfall but, rather, just took his cheque and went home--I find this sort of behaviour curious if, indeed, the payroll cheque was for an amount very substantially less than his actual earnings.

Fleming also testified that on November 20th he returned the keys to a company vehicle but, at the same time, says that he had secured Esmaili ' s agreement to pay the balance of the monies that were allegedly owed to him. If Esmaili had agreed to pay any monies owed, why would Fleming have found it necessary , at that point, to return the vehicle keys and simply walk out the door?

On the other hand, Esmaili presented his evidence in a consistent manner; internally inconsistent at the hearing and consistent with his version of events as told to the delegate during the investigation. I simply cannot rely on Fleming's evidence and have no reason to disbelieve the employer's evidence. Based on the employer's evidence, I cannot conclude that Fleming is entitled to any further wages beyond those already paid to him.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal