

An appeal

- by -

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

- 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: Carol L. Roberts

FILE No.: 2003A/317

DATE OF DECISION: March 3, 2004

DECISION

SUBMISSIONS

Eddie Lowe:	On behalf of 578047 B.C. Ltd., operating as Pro Gas & Heating ("Pro Gas")
Luke Krayenhoff:	On behalf of the Director of Employment Standards
Michael Elsdon:	On his own behalf

OVERVIEW

This is an appeal by Pro Gas, pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued November 7, 2003. Michael Elsdon complained that Pro Gas contravened the Act by failing to pay him wages and vacation pay.

Following an investigation, the Director's delegate determined that Pro Gas had contravened the Act, and that Mr. Elsdon was entitled to wages and interest in the amount of \$55.28.

Pro Gas argues that the delegate erred in law and failed to observe the principles of natural justice, and seeks to have the Determination cancelled.

ISSUE TO BE DECIDED

1. Did the delegate err in finding that Mr. Elsdon was entitled to wages on his first day of employment?
2. Did the delegate fail to observe the principles of natural justice?

FACTS

Pro Gas is a furnace installation and repair business which also operated a telemarketing business. Mr. Elsdon was at Pro Gas from June 3, 2002 to June 6, 2002 as a telemarketer. Mr. Elsdon quit on June 6, 2002 after allegedly working for seven hours a day for four days with 45 minutes in unpaid breaks. On October 17, 2003, Pro Gas gave Mr. Elsdon a cheque for three days wages, less payroll deductions, and a \$25.00 deduction for a "payclock card". It contended that Mr. Elsdon was still in the hiring process on June 3, 2002 and that he did not commence work until June 4, 2002.

The delegate determined that Mr. Elsdon had not been paid all of his wages, and that Pro Gas had improperly deducted \$25.00 from his wages as a business cost. The delegate determined that Pro Gas was required to pay Mr. Elsdon for his training day or hiring day since he performed work for the benefit of the employer.

The delegate determined that Mr. Elsdon was entitled to \$55.28.

ARGUMENT

Mr. Lowe argues that the delegate erred in law in finding that Mr. Elsdon was entitled to pay for what was an “evaluation day”. He submits that Pro Gas had “every right to submit potential employees to rigorous testing to ensure that ability to perform the work that is the subject of the applicant’s application for employment.”

Mr. Lowe argues that it is absurd for the delegate to “...presuppose to know this companies hiring and testing practice without any investigation as to the aforementioned.” [reproduced as written] He submits that, when a potential employee mirrors the functions of a position during an evaluation of their competency, those activities cannot be considered employment.

Mr. Lowe also submitted that Pro Gas had filed a lawsuit against the delegate who issued the Determination. While he acknowledged that the lawsuit had nothing to do with the Determination regarding Mr. Munford, he contended that the lawsuit “speaks to natural justice and the Delegate of the Director of Employment Standards treatment and bias conduct towards this company”.

Mr. Elsdon submitted that, on his first day at the work place, he made actual calls to Pro Gas’ customers, and that Pro Gas could have made a profit from his services. He also contended that it was his belief that he was receiving training to perform the job, and that he was not undergoing a second interview.

ANALYSIS

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 of establishing that the Determination is incorrect rests with an Appellant.

Having reviewed the submissions of the parties, I am unable to find that the delegate erred in law or failed to observe the principles of natural justice.

Error of law

Mr. Lowe contends that the delegate erred in his characterization of the first day of Mr. Elsdon’s employment as employment, not part of the hiring process. The evidence is that Mr. Elsdon was at Pro Gas offices for seven hours. The delegate did not accept that it would take an employer seven hours to hire an employee, and determined that it was part of a training process.

According to Mr. Lowe’s submission, on June 3, 2002, Mr. Elsdon spent seven hours learning about the employer’s database and company requirements, among other things. Given that Mr. Elsdon was learning about the company’s operations prior to beginning his regular work, the work was performed for the benefit of the employer.

While the tutorial may also serve the purpose of determining Mr. Elsdon's aptitude for the position, I find no error in the delegate's conclusion that the activities were in the nature of training, and that Mr. Elsdon fell within the definition of employee in the Act.

Failure to observe natural justice

One of the fundamental principles of natural justice is that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence (the rule against bias). The concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" (Valente v. The Queen, [1985] 2 S.C.R. 673 at p. 685)

The onus of demonstrating bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

Although Mr. Lowe contends that the delegate is biased towards him, he does not specify how the delegate might be so biased, but for his reference to a lawsuit Pro Gas has purportedly filed against him. A statement of claim, if one has indeed been filed, is not evidence of anything. The statement of claim may contain allegations, but those allegations, without more, do not form grounds for an appeal on the grounds that the delegate failed observe natural justice.

I find no basis for the appeal on this ground.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated November 7, 2003, be confirmed, together with whatever interest may have accrued since that date.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal