

An appeal

- by -

Tara Colors Ltd.
("TCL")

- 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/19

DATE OF DECISION: March 30, 2005

DECISION

SUBMISSIONS

Archie Kaario, Barrister & Solicitor

on behalf of Tara Colors Ltd.

Lynn Egan

on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Tara Colours Ltd. ("TCL"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued December 31, 2004.

Cheya Soultanian worked as a painter for TCL, a commercial painting business, from October 24, 2002 until July 30, 2003. Mr. Soultanian filed a complaint alleging that he was owed regular wages in the amount of \$820.00 for the period July 16 to 29, 2004.

The Director's delegate held a teleconference hearing into Mr. Soultanian's complaint on December 14, 2004. Mr. Soultanian did not appear at the hearing, although he was aware of his opportunity to do so. Mr. Bossani appeared on TCL's behalf.

Based on the complaint information form and TCL's evidence, the delegate determined that TCL had contravened Sections 17, 18 and 28 of the *Employment Standards Act* in failing to pay Mr. Soultanian wages within 8 days of the end of each semi-monthly pay period, failing to pay all outstanding wages and annual vacation, and failing to keep proper payroll records. The delegate concluded that Mr. Soultanian was entitled to wages in the total amount, with interest, of \$834.79. The delegate also imposed a \$1,500 penalty on TCL for each of the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.

TCL seeks to have the Determination varied to reflect a payment of \$820.00 to Mr. Soultanian.

ISSUES

1. Did the Director's delegate err in law in determining that TCL owed wages to Mr. Soultanian?
2. Did the Director's delegate fail to observe the principles of natural justice in making the Determination?
3. Has new and relevant evidence become available that was not available at the time the Determination was being made?

THE FACTS AND ARGUMENT

On June 21, 2004, a delegate sought further information from Mr. Soultanian regarding his claim, specifically the days and hours he worked for which he was not paid. Mr. Soultanian provided only a

copy of his bank account showing deposits and withdrawals for the period June 5, 2003 to October 6, 2003. None of the deposits were in the amounts of the cheques issued to him during that time.

The Director also issued a demand for employer records which were to be delivered to the delegate by November 26, 2004. TCL gave the delegate copies of cancelled cheques made out to Mr. Soutanian dated June 30, July 15 and July 31, 2003 in the amounts of \$589.50, \$830.00 and \$820.00 respectively. During the hearing, Mr. Boussani submitted an additional cheque dated June 16, 2003 in the amount of \$800.50. The delegate confirmed that Mr. Soutanian had cashed all four cheques.

Mr. Soutanian did not appear at the hearing. The delegate confirmed that he had been served with notice of the date and time of the hearing. She also noted that Branch staff had confirmed his attendance the day prior to the hearing.

Although Mr. Soutanian did not appear in support of his complaint, the delegate proceeded to hear evidence from TCL in response to Mr. Soutanian's allegations. Although Mr. Soutanian alleged he was owed \$820.00, he provided no evidence or calculation of the amount, despite being asked to do so. TCL took the position that Mr. Soutanian was an independent contractor. TCL contended that Mr. Soutanian invoiced TCL every two weeks, but did not provide the delegate with copies of any invoices.

Although Mr. Bossani had no personal knowledge of Mr. Soutanian's relationship with TCL, he asserted that TCL had no employees, and did not maintain a payroll. He stated that workers were paid by piece, and invoiced TCL semi-monthly. Payments were made approximately 15 days later. During the hearing, Mr. Bossani expressed uncertainty with respect to Mr. Soutanian's method of payment, telephoned Mr. Soltani, TCL's officer/director, and stated that Mr. Soutanian was paid within two days of his invoices being submitted.

The delegate posed a number of questions to Mr. Bossani regarding his assertions about Mr. Soutanian's status as an independent contractor. According to Mr. Bossani, Mr. Soltani's stepson set Mr. Soutanian's hours of work, rate of pay, work location, and standards of performance. TCL also provided Mr. Soutanian with ladders, paint, scaffolding, rollers, brushes and all other equipment. The delegate found no evidence that Mr. Soutanian operated his own painting business.

The delegate considered the statutory definitions of employer and employee as well as the common law tests of employment to determine the nature of the relationship between the parties. She concluded that Mr. Soutanian was an employee. She also determined that TCL was obligated to maintain employer records, including Mr. Soutanian's daily hours of work and to produce those records on demand. As it did not, the delegate found a contravention of section 28 of the Act.

The delegate concluded that the July 31, 2003 cheque did not represent Mr. Soutanian's wages for the period July 16 to 29, 2003 based on Mr. Bossani's statement that wages paid at the end of the month represented payment for work performed during the first half of the month. She concluded that if Mr. Bossani's "altered" testimony was accepted, the cheques would have to be dated a day or so after the 15th and last day of each month. She did not accept Mr. Bossani's "altered" testimony, or the evidence he gave after speaking to Mr. Soltani, that wages were paid within a day or so after each pay period. She determined, therefore, that the July 31, 2003 cheque represented wages earned for the period July 1 – 15, 2003, and found no evidence that wages had been paid for the period July 15 – 31, 2003.

The delegate also found a contravention of section 17 of the Act in that TCL did not pay all wages earned within 8 days after the end of each pay period.

The delegate concluded that, although Mr. Soutanian did not provide evidence to support his claim, it was TCL's obligation to maintain and provide employer records showing Mr. Soutanian's wage entitlement. In the absence of any employer records and any denial by TCL, the delegate accepted Mr. Soutanian's assertions that he worked 40 hours per week during the final pay period. She determined his rate of pay at the minimum wage of \$8.00 in the absence of any other evidence, and concluded that Mr. Soutanian was entitled to wages of \$640.00. The delegate found a contravention of section 18 of the Act for TCL's failure to pay all wages owing within 6 days of the date the employee quits, or within 48 hours if the employer terminates the employee.

Finally, the delegate found that TCL's failure to maintain payroll records frustrated her ability to determine his vacation pay, so calculated his entitlement based on 4% of the cancelled cheques plus the amount of outstanding wages, for a total of \$147.20.

ARGUMENT

Through its counsel, TCL contends that the delegate was not in a position to determine a contravention of section 18. Mr. Kaario argues that TCL's July 31, 2003 cheque represents payment of wages for the period July 16 – 29, 2003, the period of time for which the claim is made. In support of this argument, Mr. Kaario submits a document dated February 5, 2005, in which Mr. Soutanian acknowledges that he is not owed any further wages.

Mr. Kaario submits that the delegate failed to observe the principles of natural justice in allowing Mr. Soltani to be present at the time the hearing took place. I infer that Mr. Kaario intends to argue that the delegate erred in failing to allow Mr. Soltani to be present. He submits that Mr. Soltani did not agree that the hearing could proceed in his absence. Further, he submits it was unfair of the delegate to make certain findings about the payments in the absence of any explanation by Mr. Soltani. Mr. Kaario says that the delegate's failure to allow Mr. Soltani to be present in person, or by telephone denied him the opportunity to give evidence and respond to questions. Mr. Kaario argues that, because Mr. Soutanian did not appear, the delegate ought to have dismissed the complaint for lack of evidence.

TCL submits that there should be no determination that TCL contravened sections 17 and 18 of the Act.

The delegate submits that because the February 5, 2005 document was not submitted previously, the dispute between the parties has likely been resolved, but submits that the penalties were appropriately applied and ought to be upheld.

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 the grounds for an appeal rests with an Appellant. Having reviewed the submissions of the parties, I am persuaded that the Determination should be varied to reflect an \$820.00 payment to Mr. Soutanian.

I find no basis for TCL's contention that it was not afforded a fair hearing. The Branch made a number of attempts to arrange a hearing date convenient to Mr. Soltani. The record shows that Mr. Soltani expressly authorized Mr. Bossani to appear at the hearing on TCL's behalf. There is no evidence Mr. Soltani did not appear because he was aware Mr. Soutanian was also not going to appear.

However, it is difficult to understand why the delegate made a determination in favour of Mr. Soutanian in light of the evidence before her. The burden of proof or "risk of non-persuasion" (see: *World Project Management Inc. et al.* BC EST #134/97) is a civil standard on a balance of probabilities. The burden of persuasion is a shifting one, depending on the evidence presented by each side.

Mr. Soutanian had some obligation to advance his claim. The complaint form contains only allegations, and is, in and of itself, not evidence. Mr. Soutanian did not appear at the hearing, nor did he present any details of the days and hours he worked for which he was not paid despite being asked to do so (delegate's letter of June 21, 2004). In the complaint document, Mr. Soutanian says that he was owed wages for the period July 16 – 29, 2003. However, in the body of the complaint he says "... On July 16/03 I said that before I start working for the next 2 weeks I need my money for last pay period. He didn't pay me, so I quit that day." [reproduced as written] In my view, that internal inconsistency required an explanation from Mr. Soutanian. Furthermore, given the employer's evidence that Mr. Soutanian cashed a cheque dated July 31, 2003 for the exact amount of his claim also required an explanation. Even if the delegate accepted the complaint form as *prima facie* evidence, given TCL's evidence that Mr. Soutanian had cashed a cheque in the exact amount specified in the complaint documents, the delegate ought to have sought Mr. Soutanian's response. In my view, TCL had met the burden to responding to the complaint, and the evidence it presented required an explanation from Mr. Soutanian. Although the delegate found that the July 31, 2004 cheque represented payment for the period July 1 -15, 2004, given Mr. Soutanian's statement that he quit on July 16, 2004, the cheque may very well have been payment for that period. In my view, the burden was not adequately discharged in this case, and ought to have been dismissed after hearing the employer's evidence.

However, it appears that, in any event, the complaint has been resolved in light of the new evidence, or Mr. Soutanian's February 3, 2005 document in which he acknowledges that he has been paid in full. The signature on the note resembles the signature on the complaint form as well as on the cancelled cheques. I infer the note was not obtained under duress, as Mr. Soutanian did not make any submissions in response to TCL's appeal.

I conclude that Mr. Soutanian's claim for wages and vacation pay has been satisfied, and the Determination should be varied in this respect. However, I am not persuaded that the penalty assessments should be cancelled.

The delegate found contraventions of sections 17, 18 and 28 of the Act and imposed a \$500.00 penalty for each contravention.

TCL did not provide employer records in response to the Director's demands. It provides no satisfactory evidence on appeal to refute the delegate's conclusion that Mr. Soultanian was an employee. There is no evidence TCL maintained payroll records as it was required to do. Therefore, I find the penalty assessment for a contravention of section 28 was appropriately imposed.

The evidence was that Mr. Soultanian received his final payment either on July 31, 2004 or some time around February, 2005. Given TCL's failure to maintain proper employer records, it is impossible to determine whether it paid Mr. Soultanian within 8 days after the end of each pay period, as it is required to do under section 17 of the Act, or within 6 days after he quit, which it is required to do under section 18 of the Act. I find that the penalty assessments for contraventions of these sections were also appropriately imposed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated December 15, 2004, be varied to confirm penalty assessments in the amount of \$1,500.00, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal