



An appeal

- by -

Brad's Trucking Ltd.
(“Brad’s”)

- 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/33

DATE OF DECISION: May 13, 2014

DECISION

SUBMISSIONS

Maryon Gallant

on behalf of Brad's Trucking Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Brad's Trucking Ltd. ("Brad's") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 13, 2014. In that Determination, the Director ordered Brad's to pay its former employee, Colin Hall, \$2,001.89 in wages, annual vacation pay and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for Brad's contravention of section 63 of the *Act* and section 46 of the *Employment Standards Regulation* (the "*Regulation*"), for a total amount payable of \$3,001.89.
2. Brad's appeals the Determination alleging that the Director failed to observe the principles of natural justice in making the Determination.
3. 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.
4. These reasons are based on Brad'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

5. The facts are drawn from the Determination and the section 112(5) "record".
6. Mr. Hall was employed by Brad's as a welder commencing September 17, 2013. On October 18, 2013, Mr. Hall filed a complaint with the Director alleging that Brad's had contravened the *Act* in failing to pay him all wages earned.
7. On November 15, 2013, the Director issued a Demand for payroll records from Brad's. Those records were to be produced by December 6, 2013. No records were ever submitted.
8. The Director conducted a hearing regarding Mr. Hall's complaint on January 15, 2014.
9. Mr. Hall's evidence was that, on or about September 17, 2013, when he was employed by another trucking company, Mr. Gallant called him and asked him to perform some work for Brad's. Mr. Gallant was hospitalized soon afterwards so Mr. Hall went to the hospital to discuss what work he wanted him to do. Once Mr. Hall began that work, he was supervised by Brad Gallant, Mr. Gallant's son. Mr. Hall's evidence was that Mr. Gallant told him he would be paid \$33 per hour. Mr. Hall also provided the delegate with a calendar on which his daily hours of work were recorded.

10. Mr. Gallant denied that he agreed to pay Mr. Hall \$33 per hour. Although Mr. Gallant agreed that Mr. Hall did the work he was asked to do, he contended that it took Mr. Hall three times longer to perform a job than it ought to and that he challenged Mr. Hall on his hours of work. Mr. Gallant agreed that he did not discuss an hourly rate of pay when he first hired Mr. Hall and that, after the work was completed, he offered to pay Mr. Hall \$20 per hour “or something.” Mr. Gallant said that he had not provided the Director with any employer records despite a Demand for those records because Mr. Hall had not accounted for all the hours he wanted to be paid for.
11. The delegate found no evidence of an agreed upon rate of pay. He also found Mr. Gallant’s testimony about Mr. Hall’s wage rate to be vague and uncertain. The delegate noted that Mr. Hall’s evidence on this point to be consistent and concluded that a rate of \$33 per hour for a welder was not “patently unreasonable”. In the absence of any Employer Records, the delegate determined that Mr. Hall’s rate of pay was \$33 per hour.
12. The delegate noted that Mr. Hall submitted his hours of work as recorded on his calendar to Brad’s at Mr. Gallant’s request. The delegate considered the fact that Mr. Gallant did not dispute that these hours were identical to those on time cards submitted by Mr. Hall or that they were in any way inaccurate. The delegate noted that Mr. Gallant’s son, Brad, was present at the worksite when Mr. Hall performed the work, and that Mr. Gallant did not call Brad as a witness to challenge Mr. Hall’s evidence. The delegate concluded that Mr. Hall’s record of his hours of work were the best evidence.
13. Based on his findings regarding Mr. Hall’s hourly rate and his hours of work, the delegate determined that Brad’s had contravened the *Act* in failing to pay Mr. Hall all wages he was entitled to.
14. The delegate also found that Brad’s had contravened the *Regulation* in failing to produce payroll records as required by the Demand.

ARGUMENT

15. In its appeal submissions, Brad’s asserts that Mr. Hall wanted to be paid as a contractor, as evidenced by the advance payment it made to him, which was without deductions. Brad’s asserts that the \$33 per hour wage rate, which it acknowledges was discussed by the parties as a possible rate, was “never an agreed upon figure.”
16. Brad’s continues to dispute Mr. Hall’s hours of work, asserting that, after Mr. Gallant was released from hospital, he asked Mr. Hall to justify his hours of work and Mr. Hall would not do so.
17. In a supplementary submission, Brad’s says that Mr. Hall did not provide them with his Social Insurance Number, address or any personal information, despite a request that he do so. Consequently, it says that Brad’s could not issue a cheque with any deductions “even if it wanted to.”

ANALYSIS

18. 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.

19. 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 Brad's has not met that burden.
20. The sole ground of Brad's appeal is that the delegate failed to observe the principles of natural justice. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that suggests, or establishes, that Brad's was denied natural justice. Mr. Gallant attended the hearing by teleconference, gave evidence and was able to ask questions of Mr. Hall. However, for the first time on appeal Mr. Gallant asserts that he is hard of hearing and that it was difficult for him to participate in a hearing conducted by teleconference:
- Mr. Gallant is extremely hard of hearing even with his aids and therefore and in all probability did not understand the depth of the questions. A face to face meeting would have simplified everything a great deal, as we were led to believe.*
21. The hearing notice, dated November 15, 2013, clearly indicates that the hearing would be conducted by teleconference. There is no evidence Mr. Gallant objected to the hearing being conducted by this method. Furthermore, there is nothing in the Determination that suggests that Mr. Gallant had any difficulty hearing or understanding questions at the hearing. Had Mr. Gallant notified the delegate he was having some difficulties understanding or hearing the questions or evidence, he likely would have been accommodated. In the absence of any evidence that these hearing difficulties would have led the delegate to reach a different conclusion, I find no basis for this ground of appeal.
22. In a supplementary submission, Brad's also suggests that a witness who Mr. Hall sought to call to give evidence was available to do so. It is not clear to me how the failure of the delegate to consider evidence of Mr. Hall's potential witness was a denial of natural justice. I infer from the record that the witness was to give evidence supporting Mr. Hall's evidence about his hours of work. I am not persuaded that Brad's was denied natural justice by the delegate's inability to consider evidence that was, in all likelihood, adverse to Brad's position.
23. It is apparent that Brad's is unhappy with the decision. For the first time on appeal, Brad's takes the position that Mr. Hall was a self-employed contractor rather than an employee. As the Tribunal has repeatedly said, an appeal is not intended to be an opportunity to present new evidence, make new arguments or to have the Tribunal review and re-weigh the issues and reach a different conclusion. Absent any evidence substantiating one of the grounds of appeal, the Tribunal will not interfere with a Determination.
24. 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.
25. I dismiss the appeal.

ORDER

26. 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 13, 2014, is confirmed, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal