

An appeal

- by -

Thomas and Alvina Versteeg
(“Versteeg”)

- 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: David B. Stevenson

FILE No.: 2002/573

DATE OF DECISION: February 6, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Thomas and Alvina Versteeg (“the Versteegs”) of a Determination of the Director of Employment Standards (the “Director”) dated October 30, 2002.

The Versteegs had filed a complaint with the Director alleging they were owed money from their employer, Middlegate Developments Ltd. (“Middlegate”). The complaint included a claim for unpaid wages, minimum wage, compensation for personal use of the Versteegs fax and computer and general damages under a variety of headings. The Versteegs were advised, and accepted, the claims for damages were outside the jurisdiction of the Director and the investigation of the complaint was limited to the claims for unpaid wages, minimum wage and personal use of the Versteegs fax and computer. The Determination found the Versteegs were not owed wages or minimum wages and that there was no evidence showing the Versteegs fax and computer were used exclusively for Middlegate’s business, and to the extent that equipment was used in Middlegate’s business, it was not possible to place a monetary value on that usage. The Determination concluded the *Act* had not been contravened, ceased investigating and closed the file on the complaint.

The appeal suggests the Director failed to investigate, or at least properly investigate, the complaint, did not give the Versteegs an opportunity to respond, consult on factual details or provide ‘feedback’ before issuing the Determination. The appeal asks that the matter be sent back to the Director for further investigation.

The appeal asks for an oral hearing. Generally, the Tribunal will not hold an oral hearing on an appeal unless the case involves a serious question of credibility on one or more key issues or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly (see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)* [2001] B.C.J. No. 1142 (B.C.S.C.)). The Versteegs request an oral hearing on the basis that “at this point my claim is unfairly represented”. This appeal does not contain any facts or reasons which lead me to conclude that an oral hearing would be the only adequate way of providing the Versteegs with a fair opportunity to state their appeal.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue in this appeal is whether the Versteegs have shown the Determination should be referred back to the Director for further investigation.

FACTS

Middlegate is a property management company. The Versteegs worked for Middlegate from February 1, 1999 to November 13, 2001 as resident caretakers at a combined monthly salary of \$2,950.00 plus a rent benefit of \$500.00. The Versteegs had requested their salaries be combined and paid to Thomas Versteeg only.

The Versteegs filed their complaint in the time period allowed by the *Act*. Receipt of the complaint was acknowledged in writing by the Director on April 11, 2002. On May 10, 2002, the Versteegs filed a comprehensive submission outlining, and quantifying, their claims. The Director responded in writing to that submission on July 8, 2002. The letter advised the Versteegs that some aspects of their claim were not within the jurisdiction of the Director. It also included the following comment:

As for the other items of your claim relating to minimum wage and wages owing for work performed, I will inform the employer of your allegations and you will be given the opportunity to respond to any of their contentions.

Middlegate responded in a document dated August 9, 2002 and that document was forwarded to the Versteegs by the Director on August 15, 2002. The Versteegs were invited by the Director to respond. In a letter dated August 26, 2002, the Versteegs provided a partial response to the submission of Middlegate and requested an additional 14 days to provide the balance of their response. In a letter dated September 14, 2002, the Versteegs provided the Director with the rest of their response.

On the claim for unpaid wages, the Director noted that Part 4 of the *Act*, other than Sections 31, 36 and 39 do not apply to resident caretakers and found there was insufficient evidence to conclude the Versteegs had not been provided 32 consecutive hours free from work each week or that they had worked excessive hours. On the minimum wage claim, the Director found the Versteegs had, in fact been paid more than the minimum wage for the recovery period. On the claim for payment for personal use of the Versteegs fax and computer, the Director found no evidence that the fax and computer were used exclusively for Middlegate's business, as alleged by the Versteegs, and if those pieces of equipment had been used for some of the employer's work, the monetary value of such usage could not be quantified.

ARGUMENT AND ANALYSIS

There is a burden on the Versteegs to persuade the Tribunal that the Determination is wrong in law, in fact or in some combination of law and fact (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not simply an opportunity to re-argue positions taken during the investigation.

In *Devereaux*, BC EST #D272/97, the Tribunal made the following comments relating to the responsibility placed on a person filing an appeal under Section 112 of the *Act*:

Section 112 of the *Act* establishes a right to appeal a determination. In my opinion, this right of appeal does not create a right to have a complaint investigated for a second time. Rather, there is a right to appeal a determination which was made following an investigation and in which findings of fact have been made. Thus, it is reasonable the person making an appeal should set out clearly why and how the Determination is flawed. Similarly the person making the appeal bears the

burden of proving, on the balance of probabilities, that the Determination ought to be varied or cancelled.

Similar comments are found in the Tribunal's decision *Alstad Brothers Logging Ltd.*, BC EST #D143/99:

The Tribunal is not a forum for second guessing the conclusions in the Determination. There is a burden on an appellant to show some factual or legal error has been made in the Determination. The error must be shown to arise either from the material on file or from the Determination itself.

The Versteegs suggest there was no investigation and submit that the Director gave them "no opportunity to respond to anything" and issued the Determination without any 'consultation' with them on factual details. No evidence or support for the allegation that there was no investigation by the Director of the complaints has been provided with the appeal. Also, the material on file shows that the Versteegs were given ample opportunity, which they used, to provide the Director with any information relating to their claims and to respond to the submission from Middlegate on their claims. No error in the complaint process has been shown.

The appeal makes several comments regarding the findings of fact and analysis in the Determination. Mainly, the comments contain the same allegations and arguments made during the investigation. All of those allegations and arguments were considered in the Determination. There is one factual reference that was not included in the Determination, but there is no accompanying discussion indicating whether that fact was provided to the Director during the investigation and, if it was, how the failure to consider that fact demonstrates any error in the Determination. Included in the appeal is the following assertion:

There is ample evidence just in all the paperwork that was prepared on behalf of Middlegate Developments for arbitration. I have no access to this, however Middlegate has readily available copies to substantiate my claims.

That sort of statement does not come anywhere near satisfying the burden on the Versteegs in this appeal. It does not show any error in the Determination. In a very real sense, the statement is merely speculation and the Tribunal does not grant appeals based on speculation.

Otherwise, there is nothing in the appeal that provides any reason to find the Determination is wrong or to require the matter to be referred back for further investigation. In the absence of any demonstrated error, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 30, 2002 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal