Employment Standards TRIBUNAL

An appeal

- by -

Prestige Facilities Services Inc.
("PFSI")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2011A/34

DATE OF DECISION: May 13, 2011

DECISION

SUBMISSIONS

Bim Chaube	on behalf of Prestige Facilities Services Inc.
Ken White	on behalf of the Director of Employment Standards

INTRODUCTION

1. On August 17, 2010, Luis Aguirre (the "complainant") filed an unpaid wage complaint against Prestige Facilities Services Inc. ("PFSI") under section 74 of the *Employment Standards Act* (the "*Act*"). The complainant alleged that he had been employed for about a 2-week period in the latter half of June 2010 as a janitor but had not been paid any wages whatsoever. He did receive a $1,500 cheque but this cheque could not be negotiated since PFSI issued a "stop payment" order on the cheque.

2. In due course a complaint hearing was scheduled for January 31, 2011, but PFSI failed to attend this hearing (despite having been properly served with a hearing notice) and thus the hearing proceeded in its absence. On February 10, 2011, a delegate of the Director of Employment Standards (the "delegate") issued a Determination and accompanying "Reasons for the Determination" in which he upheld the complaint and ordered PFSI to pay the complainant the total sum of $4,284.29 on account of regular wages (section 18), overtime pay (section 40), vacation pay (section 58) and section 88 interest. In addition, and also by way of the Determination, the delegate levied two separate $500 monetary penalties against PFSI (see section 98 of the *Act*) for having contravened section 18 of the *Act* and section 46 of the *Employment Standards Regulation*. Accordingly, the total amount payable under the Determination is $5,284.29.

3. PFSI now appeals the Determination under section 112(1)(1)(c) of the *Act* on the ground that "evidence has become available that was not available at the time the determination was being made". I am adjudicating this appeal based on the parties' written submissions and, in that regard, there is not very much material before me.

4. The complainant, who I understand may not be very fluent in the English language, did not file a submission. The delegate's submission is brief, but cogent: "…the Appellant has failed to provide any evidence that was not available prior to the issuing of the determination". PFSI's short submission, contained in handwritten note appended to its Appeal Form, is reproduced in full, below:

> "Luis Aguirre did not provide the service as he claims. He was not an employee. He was a sub contractor, I explained this to Employment Standards. I also find out Luis Aguirre is not allowed to work in Canada, he does not have work permit. I need the Employment Standards to consider this decision." [sic]

5. In addition to the parties' cursory submissions, I also have before me the section 112(5) record.

FINDINGS AND ANALYSIS

6. In my view, this appeal is wholly without merit and must be dismissed. As is detailed at some length in the delegate's reasons at pages R3 – R4, it appears that PFSI's principal, Mr. Chaube, was fixed and determined to have nothing to do with this particular matter. He ignored notices mailed him; he did not respond to the several telephone messages/faxes that were given him; he would not attend a pre-hearing mediation session;

he refused to provide employment records; and, ultimately, as noted above, he refused to attend the complaint hearing. With reference to that latter score, on the day of the hearing, a voice mail message was left with him and the hearing was delayed by 30 minutes so that he might be able to attend but he still was a no show. Whatever evidence PFSI now wishes to put before the Tribunal was obviously available as of the January 31, 2011, hearing date and the only reason why this evidence was not put before the delegate is because PFSI adamantly refused to participate in the process. PFSI is thus, as Shakespeare put it, "hoist by its own petard".

7. I wish to briefly comment on the individual points raised in PFSI's appeal documents. First, there is no evidence before me that the complainant was an independent contractor. He worked at locations where a service contract was in place between PFSI and its clients and he was subject to PFSI's direction and control. He was hired at an agreed monthly wage for an agreed work schedule. Second, there is absolutely nothing in the material before me to corroborate the bare assertion that the complainant was required, let alone did not have, a federal government work permit. In any event, that point is wholly irrelevant to this proceeding. If, in fact, the complainant did not (or does not) have a work permit, that is a matter for the relevant federal governmental agency to address. The only issue here is whether the complainant was an employee who was not paid the wages to which he was entitled under the *Act*. The delegate found in favour of the complainant on both accounts and I do not see that he erred in so finding.

ORDER

8. In accordance with the provisions of sections 114(1)(c) and 115(1)(a) of the *Act*, I am dismissing this appeal and confirming the Determination as issued in the total amount of $5,284.29. In addition, the complainant is also entitled to whatever further interest that has accrued under section 88 of the *Act* as and from the date of the Determination.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal