

An appeal

- by -

Chubb Richards also known as Leo Phillip Richards also known as Leo Chubb
Richards carrying on business as Brian's Tree Service & Window Washing &
Chubb's Enterprises
(“Richards”)

- 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: Robert E. Groves

FILE No.: 2010A/8

DATE OF DECISION: May 10, 2010

DECISION

SUBMISSIONS

L. Chubb Richards	on behalf of Chubb Richards also known as Leo Phillip Richards also known as Leo Chubb Richards carrying on business as Brian's Tree Service & Window Washing & Chubb's Enterprises
Jarred Hayman	on his own behalf
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Chubb Richards, also known as Leo Phillip Richards, also known as Leo Chubb Richards, carrying on business as Brian's Tree Service & Window Washing & Chubb's Enterprises ("Richards").
2. Richards challenges a determination of a delegate (the "Delegate") of the Director of Employment Standards dated November 27, 2009 (the "Determination"). Following an investigation, the Delegate determined that Richards had contravened sections 18 and 58 of the *Employment Standards Act* (the "*Act*") when he failed to pay wages and annual vacation pay to the complainant, Jarred Hayman ("Hayman"). Adding interest, and an administrative penalty of \$500.00, the Delegate ordered Richards to pay \$812.16.
3. As the record discloses that Richards may have filed his appeal out of time, I must first decide, as a preliminary matter, whether the appeal should be permitted to proceed on its merits, or whether it should be dismissed pursuant to section 114(1)(b) of the *Act*.
4. I have before me the Appeal Form and submission delivered to the Tribunal by Richards, the Delegate's Determination and Reasons for the Determination, a submission from the Delegate and the record the Delegate says was before her at the time the Determination was made, two further submissions from Richards each dated March 19, 2010, a submission from Richards dated April 18, 2010, an email from a Jeff Zaugg ("Zaugg") sent April 23, 2010, and an email communication from Hayman dated April 1, 2010.
5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. My review of the material before me persuades me that I may decide this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

6. Hayman filed a complaint under the *Act* alleging that Richards had failed to pay him wages for general labour work performed while he was employed by Richards from August 21 to September 1, 2009.
7. During the course of her investigation of the complaint the Delegate contacted Richards by telephone. Richards asked that the Delegate communicate with him in writing.

8. The Delegate subsequently forwarded correspondence and a Demand for Employer Records to Richards. Richards supplied payroll records, and a submission, to the Delegate in response to this correspondence in a timely way.
9. Hayman claimed that Richards had initially promised to pay him \$12.00 per hour, but that when Richards discovered Hayman had a driver's licence he agreed to bump his rate of pay to \$15.00 per hour. Hayman did not disagree with Richards' records of Hayman's hours of work that Richards' produced in response to the Demand, but he argued that he worked on other days that Richards had not noted.
10. Hayman said he was terminated when Richards alleged he had damaged one of Richards' vehicles. He also asserted that Richards made deductions from his final paycheque in order to compensate Richards for the value of the alleged damage, and for hours on the job that Richards claimed that Hayman was not performing valuable work.
11. Richards did not dispute that he had employed Hayman, but he stated that Hayman had worked for him on fewer days than alleged in Hayman's complaint, and that the timesheets he had for Hayman's work on the days he acknowledged he was working showed hours for which Richards said Hayman did not, in fact, perform work. Richards also denied that he had agreed to pay Hayman \$15.00 per hour. He said that Hayman's poor performance on the job meant that he should only be paid minimum wage.
12. The Delegate decided that there was insufficient evidence to support a finding that Richards had agreed to pay Hayman \$15.00 per hour. She concluded that it was more likely they had agreed that Hayman would be paid the \$12.00 per hour amount Hayman said they had originally discussed, as this was the rate of pay that Richards' records indicated other employees like Hayman were receiving. She stated that it was improper for Richards to agree to pay Hayman \$12.00 per hour and then decide to reduce his hourly rate unilaterally because he believed that Hayman's performance only warranted payment of minimum wage.
13. The Delegate also accepted Hayman's recollection of the extra hours on another day he worked for Richards that were not documented in the employer records Richards had submitted. The reasons she cited were that Hayman was able to recall what he did on the day in question, and where it occurred. In addition, work of that type was not recorded in any of the timesheets produced by Richards, and Hayman's records of his other work performed were consistent with the records Richards did produce.
14. The Delegate determined that section 21 of the *Act* prohibited Richards' deducting sums from Hayman's paycheque. She concluded that Richards' belief that Hayman had caused damage to a vehicle, and that Hayman was not giving full value for the hours he was working might provide grounds for discipline, but they could not be set off against Hayman's wages.
15. Richards appeals alleging that the Delegate failed to observe the principles of natural justice. He also claims that evidence has become available that was not available at the time the Determination was being made.
16. In her submission delivered for the purposes of this appeal, the Delegate asserts that the Determination was sent by registered mail on November 27, 2009, to the address for Richards he provided during the course of the investigation. It is the same address noted on Richards' Appeal Form. The Delegate says further that Canada Post records have revealed to her that delivery of that correspondence was refused. A notice on the Determination document advised that the time for filing an appeal with the Tribunal would expire on January 4, 2010.

17. Richards states that he informed the Employment Standards Branch that any correspondence being sent to him should be forwarded via regular mail. Richards advises that he gave this direction in January 2009. If so, it preceded his employment of Hayman by approximately eight months. Hayman's complaint to the Branch was filed even later, in October 2009.
18. The Delegate states that Richards never informed her that communications should only be forwarded to him via regular, not registered, mail.
19. The reason Richards gives for his preferring regular mail as a mode of communication is that he works in the "bush" and is unable to pick up registered mail. He says that the material forwarded to him throughout the investigation of Hayman's complaint was sent by regular mail, but the Determination was not. The inference to be drawn from Richards' submission is that he was unaware that the Determination had been issued until after the appeal period had expired.
20. The Branch forwarded a letter to Richards at his stated address, by regular mail, dated January 11, 2010, enclosing a further copy of the Determination, advising that the appeal period had expired and that if payment of the amount owed was not received within a fixed time, collection proceedings would ensue. This correspondence was received, and after an attempt to file an appeal with the Branch, Richards delivered his Appeal Form to the Tribunal on January 20, 2010, that is, over two weeks late.

ISSUE

21. Should the Tribunal extend the time period within which Richards may request an appeal to January 20, 2010, the date Richards filed his Appeal Form?

ANALYSIS

22. Section 112(3) of the *Act* provides that a person served with a determination has either 30 days or 21 days to file an appeal depending on the mode of service. In the case of service by registered mail, the time period is 30 days after the date of service. The time period is only 21 days if the determination is personally served or served by means of a transmission of the determination to the person electronically or by fax machine.
23. In this case, the uncontradicted evidence of the Delegate is that she forwarded the Determination to Richards by registered mail on November 27, 2009.
24. The time limits within which one must appeal a determination are to be construed having regard to the purposes of the *Act*, set out in section 2. One of those purposes is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is in the interest of all parties to have complaints and appeals dealt with promptly.
25. Pursuant to section 109(1)(b) of the *Act*, the Tribunal may extend the time period for requesting an appeal even though the period has expired. In considering whether to extend the time, the Tribunal is exercising a discretion, and it will not grant an extension as a matter of course. Rather, the appellant has the burden of demonstrating that there are compelling reasons why the appeal should be permitted to proceed on the merits, notwithstanding that it has been filed late (see *Niemisto*, BC EST # D099/96; *Tang*, BC EST # D211/96).

26. Two of the factors that the Tribunal has said should be considered when it determines whether an appeal filed late should be permitted to proceed on its merits are:
- There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
 - There is a strong *prima facie* case in favour of the appellant.
27. In my opinion, Richards has failed to meet the burden resting on him having regard to both these factors.
28. Even if I were to assume that Richards has provided a credible explanation for his having been unaware of the existence of the Determination until after the appeal period had expired, due to his working in the “bush,” the explanation is not reasonable. Service of a determination by registered mail is specifically authorized by the *Act*. Service of a determination by regular mail is not. Richards cannot render inoperative a statutory provision merely by expressing a preference that he be notified of developments by regular mail.
29. Richards knew the Delegate was conducting an investigation, and that a determination was likely to follow. The evidence of the Delegate, again uncontradicted, is that delivery of the registered mail communication containing the Determination was refused. While Richards may have been out in the “bush” when this occurred, it is my view that a reasonable person in his situation would have made arrangements to ensure that any communications which might come from the Branch were received and dealt with appropriately. Richards could not reasonably expect that the proceedings involving the Delegate would be placed in abeyance automatically for the period of time that he remained out of town.
30. Nor can I conclude that Richards has presented a strong *prima facie* case that his appeal should succeed on the merits. Richards asserts that the Delegate failed to observe the principles of natural justice, yet he provides no particulars of the alleged failure, and none are apparent on a review of the record. It is clear that Richards was fully apprised of the nature of Hayman’s complaint, that he was able to present his case in response, and that he took ample advantage of that opportunity.
31. Richards also alleges that evidence has become available that was not available at the time the Determination was being made. He tenders the email statement of Zaugg which recounts conversations with Hayman that support the Delegate’s conclusion that there was no agreement he was to be paid at a rate of \$15.00 per hour. The email also refers in a general way to Hayman’s inferior performance on the job. Neither of these areas of focus are probative for the purposes of challenging the conclusions the Delegate reached in her Determination.
32. Furthermore, Richards provides no explanation why the Zaugg evidence could not have been presented to the Delegate during her investigation, and before she issued the Determination. Absent such an explanation, I cannot conclude that the evidence was unavailable to Richards when the Determination was being made.
33. Having regard to these factors, there is no reasonable prospect that Richard’s appeal will be successful if it were to proceed on the merits.

ORDER

34. Pursuant to section 114(1)(b) of the *Act*, I order that the appeal be dismissed.

Robert E. Groves
Member
Employment Standards Tribunal