Employment Standards TRIBUNAL

An appeal

- by -

Joseph Rodgers, carrying on business as Sherwood Roofing
(the "Employer")

- 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: Sheldon M. Seigel

FILE No.: 2009A/043

DATE OF DECISION: May 27, 2009

DECISION

SUBMISSIONS

Joseph Rodgers	on his own behalf
Korey Pool	on his own behalf
Robert D. Krell	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by Joseph Rodgers, carrying on business as Sherwood Roofing, (the "Employer") of a Determination that was issued on February 25, 2009, by a delegate of the Director of Employment Standards (the "Director"). The Determination found that the Employer had contravened sections 17, 18, 21, and 58 of the *Act,* in respect of the employment of Korey Pool (the "Employee"), and ordered the Employer to pay to the Employee the amount of $10,313.43. This amount included wages, annual vacation pay, employee paid employer business costs, and accrued interest (s.88 of the *Act*).

2. The Director also imposed administrative penalties on the Employer under Section 29(1) of the *Employment Standard Regulation* (*"Regulation"*) in the amount of $1,500.00 relating to sections 17, 18, and 21 of the *Act*.

3. The Employer submits that information has become available that was not available at the time the Determination was made and seeks a cancellation of the Determination.

ISSUE

4. The issue in this appeal is whether new evidence became available that was not available at the time the Determination was made. The Appellant claims that he did not have notice of the hearing that led to the Determination and would like to have his evidence heard and considered before a final Determination is made. Therefore, a sub-issue is whether the Employer was denied an opportunity to be heard and have his evidence considered by reason of lack of notice of the hearing.

ARGUMENT

5. The only relevant claim made in the appeal is that the Employer was not aware of the Administrative action[s].

6. Subsequent to filing the appeal, the Employer provides submissions that add the following relevant passage to his claim: *No employee or sub-trade would ever be paid $17.00 per hour without transportation or own tools…*

7. The Employee/Respondent submits that the Employer was aware of the Employment Standards action as the Employee "personally issued [the Employer] a letter…" and "was in contact with [the Employer's] son, stepdaughter and ex-wife, who talk to [the Employer] on a fairly frequent basis ([the Employer] lives with his son)." The Employee also says that the Employer was avoiding involvement with the matter.

8. The Director submits that all of the information contained in the Employer's submissions was available at the time of the investigation leading up to the Determination and that the Determination was based on a full analysis of the evidence available at that time.

9. As for the Employer's non-involvement with the hearing, the Director confirms that the Employer did not participate or respond to any notices or letters or phone calls to his attention with respect to this matter and the Determination was made without the Employer's participation.

ANALYSIS

10. The appeal was filed in time. The Employer claims in the appeal that he had no notice of the hearing and therefore could not present his evidence contrary to that of the Employee. The Employer presents little indication of what his evidence would have been had he participated in the hearing leading up to the determination, but for his remark that no employee or sub-trade would be paid the amount claimed. He also provides very little answer in his appeal or subsequent submissions as to why he might have missed the letters, notices and other communications all designed to prompt his involvement in the administrative process leading to the Determination. The Employer does submit that for a period of six weeks he was staying in temporary accommodation but does not address issues of personal contact alleged by the Employee with the Employer's family, phone calls to the Employer's business or indeed Registered mail to his attention. I note that the Employer does not indicate the dates of his sojourn from his usual residence or compare the time frame with the time of the notice and hearing periods.

11. The Director provides less than adequate reasons for some of his conclusions in the determination. He recites some of the Employee's evidence:

> *Mr. Pool has made numerous attempts to communicate with Mr. Rodgers in hope of resolving the difference. Mr. Rodgers has avoided all of Mr. Pool's attempts to communicate with him.*

12. The Director then says of the opportunity to respond:

> *Documentation on file indicates Mr. Rodgers continued and continues to avoid communication with this office as well.*

13. Then the Director finds:

> *I find that it is necessary to reach a conclusion with respect to Mr. Pool's claim in spite of what appears to be Mr. Rodgers' decision to avoid participation in the process. I am satisfied Mr. Rodgers is aware of Mr. Pool's claim before the Employment Standards Branch.* And: *I conclude, based on the circumstances and a balance of probabilities that Mr. Rodgers has purposefully failed to claim Registered Mail as part of his strategy to avoid addressing his wage obligations to Mr. Pool.*

14. The Director's conclusions that Mr. Rodgers continued and continues to avoid communication with the Employment Standards office is not supported by detailed reference to the underlying documentation or other evidence. The reader cannot understand from where the conclusions come. There is no indication of by what means the Appellant avoided communication with the Claimant or with the Employment Standards office and no evidence stated on the face of the Determination that is inconsistent with the Appellant's claim of no actual notice. The Director makes findings relative to "what appears to be Mr. Rodgers' decision to avoid participation in the process." He concludes "based on the circumstance and on the balance of probabilities" that Mr. Rodgers purposely failed to claim Registered mail as part of an intentional strategy. I see no evidence in my file on which the Director could make such a claim. I see no circumstances that support a conclusion that the Employer intentionally avoided service or involvement with the Employment

Standards matter, and fail to see the data to which the Director applied the burden of proof (balance of probabilities) in coming to his stated conclusion. There is simply no supporting evidence that confirms a purposeful or intentional avoidance.

15. The Director goes on to state that there is evidence that a Notice of Complaint Hearing was sent to the Employer's last known business address by Registered mail and deposited with Canada Post on January 21, 2009. Then he cites Section 122 of the *Act* as support for the position that the Employer is deemed to have notice of the hearing and therefore cannot complain about lack of actual notice:

16. Section 122 says:

> *Service of determinations, demands and notices*
>
> *122 (1) A determination or demand or a notice under section 30.1 (2) that is required to be served on a person under this Act is deemed to have been served if*
>
> *(a) served on the person, or*
>
> *(b) sent by registered mail to the person's last known address.*
>
> *(2) If service is by registered mail, the determination or demand or the notice under section 30.1 (2) is deemed to be served 8 days after the determination or demand or the notice under section 30.1 (2) is deposited in a Canada Post Office.*

17. However this section is only relevant to a Determination or demand or a notice under section 30.1(2) of the *Act* (which refers to farm labour contracts and contractors only). The Notice of Complaint is none of the three types of documents to which section 122 applies. There is no deeming provision provided for the Notice of Complaint and therefore it is left to the Director to determine and conclude with reasons if the absent party had *de facto* notice and failed to attend due to wilful action or ignorance of the process.

18. I find that the Director did so determine, but with insufficient reasons and reference to supporting documentation or other evidence that would support his Determination. The Director says; *In this case, I am satisfied that more than reasonable effort has been made to give Mr. Rodgers an opportunity to participate in this matter.* I find this conclusion to be less than adequately supported by reasons in the Determination and consequently I feel bound to refer it back to the Director of Employment Standards.

19. I note that the Employer was able to obtain the Determination and consequently submit his appeal in a timely fashion, and so I anticipate any and all issues with respect to his notice of further process should have been resolved.

20. The Appellant seeks a remedy that is inappropriate under the circumstances. To cancel the Determination would be the equivalent of allowing the Employer to escape liability to the Employee and avoid the methods of execution available through the Employment Standards Act and Regulations. The goal is neither to allow one party to benefit from another's absence nor to produce an unjust enrichment to the party absent from the process. Administrative justice requires that the Employer be allowed an opportunity to present his side of the story and that the Employee be allowed to reply. Accordingly I find that another hearing of the matter must be undertaken.

ORDER

21. Pursuant to section 115 of the *Act*, I order this matter be referred back to the Director of Employment Standards for re-hearing.

Sheldon M. Seigel
Member
Employment Standards Tribunal