

An appeal

- by -

Colorperfect Painting Ltd., Wiley J. Woods, a Director or Officer of
Colorperfect Painting Ltd., and Natalie Marie Charanek, a Director or Officer
of Colorperfect Painting Ltd.

(the “Appellants”)

- 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.: 2006A/40, 2006A/41 & 2006A/42

DATE OF DECISION: May 23, 2006

DECISION

SUBMISSIONS

Natalie Charanek and Wiley Woods	on their own behalf, and on behalf of Colorperfect Painting Ltd.
Sharn Kaila	on behalf of the Director of Employment Standards
J. Monette	on his own behalf

OVERVIEW

1. These are appeals by Natalie Charanek and Wiley Woods, both Directors or Officers of Colorperfect Painting Ltd., and Colorperfect Painting Ltd. (“CPL”) (collectively, the “Appellants”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against Determinations of the Director of Employment Standards (“the Director”) issued February 14, 2006.
2. Alexander Giesbrecht, Brett Kingswell, Mario Medina, Jean Monette and Augustin Aguilar (“the employees”) worked as labourers and painters for CPL, a commercial painting business, between June 2005 and October 4, 2005. They all filed complaints alleging that CLP had contravened the *Act* in failing to pay them wages owing.
3. Following an investigation, the Director’s delegate concluded that CPL had contravened Sections 17, 18, 40, 45 and 58 of the *Employment Standards Act* in failing to pay the employees regular and overtime wages, statutory holiday pay and annual vacation pay. The delegate determined that the employees were, collectively, entitled to wages and interest in the total amount of \$25,442.89. The delegate also imposed a \$1,500 penalty on CPL for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulations*.
4. The delegate also determined that Natalie Charanek and Wiley J. Woods were Directors and Officers of CPL at the time the wages owed to the employees were earned and should have been paid, and issued two separate Determinations against Ms. Charanek and Mr. Woods personally in the amount of \$21,010.56 each, representing two months’ unpaid wages for each employee pursuant to section 96 of the *Act*.
5. The Appellants contend that the delegate failed to observe the principles of natural justice in making the Determinations, and that evidence has become available that was not available at the time the Determinations were being made. They seek to have the Determinations varied or cancelled.
6. These appeals are decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determinations.

ISSUES

7. Did the delegate fail to observe principles of natural justice in failing to hear from the Appellants before concluding that the employees were entitled to wages?

8. Is there new and relevant evidence that would have led the delegate to a different conclusion on a material issue?

THE FACTS AND ARGUMENT

9. The employees worked for CPL on two projects; one in Burnaby, the other in Coquitlam. On November 1 and 2, 2005, they filed complaints with the Director alleging that they had not been paid, and that their employer was not answering their telephone calls.
10. The delegate attempted to contact CPL at a business telephone number which was no longer in service. On November 29, 2005, the delegate sent CPL a Demand for Employer Records by certified mail at CPL's last known business address, registered and records office, and director/officer home address. The Demand required CPL to provide a response to the complaints and for the production of records by December 9, 2005. All correspondence was returned as "unclaimed".
11. The delegate determined that sufficient attempts had been made to contact CPL to notify it of the complaints and an opportunity to respond, and investigated the complaints.
12. The delegate reviewed the documentation provided by the employees, including their time sheets. The time sheets of Kingswell, Medina and Aguilar were also signed off by Mr. Monette who was their foreman. The delegate found these time sheets to be a "credible reflection" of their hours worked, and that they were maintained on a daily basis. With respect to Mr. Giesbrecht's time sheet, the delegate found that the hours claimed were extracted from a calendar that had been maintained on daily basis.
13. The delegate determined that CPL had contravened the *Act* in failing to pay the employees all wages earned in each pay period and all wages owing upon termination of employment.
14. The delegate also found that the complainants were also entitled to overtime wages under the *Act*. Finally, the delegate also determined that Mr. Monette had not been paid statutory holiday pay for September 5, 2005.
15. The Appellants contend that the delegate did not seek their response to the complaints. They say that, had the delegate contacted them, they would have provided copies of cancelled cheques demonstrating that the wages had been paid.
16. The appeal submission contains both responses to the claims as well as allegations about the complainants' dishonesty. It also contains irrelevant commentary about the complainants' behaviour and lifestyles, which I have not considered. In summary, the Appellants say that the employees were paid in full. Attached to the appeal submission were photocopies of four cheques made out to "RNB Contracting" dated August 5, 2005 and August 15, 2005, two to Mr. Kingswell dated September 7 and 30, 2005, and one to Joey Monette dated September 7, 2005. They also say that Mr. Kingswell was fired on September 16, 2005, with his final paycheque representing a "settlement" due to "falsified hours".
17. The delegate says that all reasonable efforts were made to contact the Appellants, who had moved out of the province. The delegate says that only after the collection process was beginning that the Director received information that Mr. Woods had moved to Calgary, Alberta. The Appellants contacted the delegate only after the Alberta Employment Standards Office served them with the judgements.

18. The delegate also says that the “new evidence” ought not be accepted, as the Appellants failed to participate in the investigation process. The delegate also says that, even if the new evidence is accepted, it does not establish that wages were paid.
19. Mr. Monette contends that CPL “vanished” without paying him any money.

ANALYSIS

20. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made
21. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker, and parties alleging a denial of a fair hearing must provide some evidence in support of that allegation. (see *Dusty Investments Inc. dba Honda North* BC EST #D043/99)
22. Section 77 of the *Act* provides that, if an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.
23. The evidence establishes that the Appellants did not have knowledge of either the complaints or the investigation. However, their lack of knowledge was not due to any lack of effort by the delegate. The Appellants’ submission is silent on the circumstances surrounding their move from Port Coquitlam to Calgary, or why, for example, they did not avail themselves of Canada Post’s mail forwarding service or call forwarding service. They do not say what steps they took to advise the employees, or for that matter, any other party, where they were moving. The fact that they moved suddenly without notice lends credence to the employees’ assertions that Mr. Woods and Ms. Charanek were avoiding them.
24. I conclude that the delegate took all reasonable measures to contact the Appellants. I find that the Appellants did not know about the case they had to meet because they deliberately avoided service of any documents that would have outlined the allegations.
25. Although the Tribunal has a well established principle that it will not consider new evidence that could have been provided by the employer at the investigation stage, that principle is applicable only where the employer has knowledge of the complaint and refuses or neglects to participate in any investigation or hearing into those complaints. It does not apply where it is clear the employer does not know about the complaints, and the delegate is aware that the employer has not been given that opportunity. The fact that the express mail was returned to the delegate would have made it clear that the Appellants did not have knowledge that an investigation was being conducted.
26. However, where, as in this case, the Appellants do not know about the investigation, they must provide a reasonable explanation as to why they do not. For example, they may demonstrate that the delegate erred in addressing the mail, or Canada Post failed to deliver to a correct address. In this case, the Appellants

provide no explanation at all. It appears that they were only motivated to respond to the complaints once they were served with the judgments. As noted by the Tribunal in *Andrei Enterprises Ltd.* (BC EST #D 005/05), it is offensive to the statutory purposes and to provisions designed to foster a cooperative and expeditious resolution of complaints for an employer to fail or refuse to participate in the process, then later claim the Director got it wrong. In the absence of any reasonable explanation, I infer that the Appellants refused to participate in the process and would dismiss the appeal.

27. However, even if I am wrong in this inference, I find no basis to cancel or vary the Determinations.
28. The appellants provide a number of cancelled cheques in support of their appeals, contending that the wages determined owing have been paid. I note that they do not provide any employer records, which they are required by the *Act* to maintain and for which the delegate imposed an administrative penalty.
29. The cheques do not establish that Mr. Aguilar, Mr. Medina or Mr. Giesbrecht have been paid all wages they were entitled to. The cheque issued to Mr. Monette was factored into the delegate's calculations of wages owing to him. With respect to the two cheques issued to Mr. Kingswell, one was for a time period not covered by the complaint. Although the Appellants assert that the other reflected a settlement on termination, they provide no evidence of dismissal for cause.
30. The appeals are dismissed.

ORDER

31. I Order, pursuant to Section 115 of the *Act*, that the Determinations, dated February 14, 2006, be confirmed in the amount of \$26,942.89 for the CDET, and \$21,010.56 for the two DDETs, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal