

An appeal

- by -

Raj K. Jaspal

- 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 Ann Hart

FILE No.: 2006A/39

DATE OF DECISION: June 5, 2006

DECISION

SUBMISSIONS

Raj K. Jaspal	on his own behalf
Mary Walsh	on behalf of the Director

OVERVIEW

1. This is an appeal filed by Raj K. Jaspal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued on February 13, 2006 (the “Determination”) by a delegate of the Director of Employment Standards (the “Delegate”).
2. In the Determination, the Delegate found that the complainant had failed to prove that he was hired by, or performed work for S.G. Roofing Ltd., or that he was owed any wages under the *Act*.
3. On the Appeal Form, the appellant did not check a box (under section 2 of the Appeal Form) to indicate the grounds on which the appeal was brought.
4. Mr. Jaspal indicated on the Appeal Form that he believed that an oral hearing was necessary, but he did not provide any reasons in his submissions as to why he thought an oral hearing was required.
5. The Tribunal has concluded that an oral hearing will not be conducted in this matter, as the appeal can be appropriately addressed through written submissions.

ISSUE

6. Did the Delegate err in concluding that Raj K. Jaspal was not owed any wages under the *Act*?

BACKGROUND

7. The appellant, Raj K. Jaspal filed a complaint under section 74 of the *Act* against S.G. Roofing Ltd., which operates a roofing business. Mr. Jaspal maintained that he had been employed as a roofer for S.G. Roofing Ltd. from August 18, 2005 to September 2, 2005, at the rate of pay of \$10.75 per hour, but had not been paid regular wages, overtime wages or vacation pay.
8. In the Determination, the Delegate indicated that she had conducted a hearing on February 13, 2006, but Mr. Jaspal had not attended. The Delegate recorded in the Determination that the Notice of Complaint Hearing had been delivered to Mr. Jaspal, and was signed for by him on December 2, 2005. The Delegate also indicated that she had asked another Branch Officer to contact Mr. Jaspal by telephone after the Notice of Complaint was delivered, and before the hearing. That attempt to contact Mr. Jaspal had not been successful, and nor was an attempt to contact him on the day of the hearing, at the telephone number he had provided. Before commencing the hearing on February 13, 2006, the Delegate waited 35 minutes for Mr. Jaspal to attend, but he did not appear. The hearing proceeded in the absence of Mr. Jaspal.

ARGUMENT

9. Mr. Jaspal wrote that he had begun to work for S.G. Roofing on August 18, 2005. He had cut his arm while working at a worksite in West Vancouver that day and had attended at the hospital. He indicated that he had subsequently worked for S.G. Roofing on a number of days until September 2, 2005.
10. Mr. Jaspal indicated that he was unable to attend the hearing conducted by the Delegate on February 13, 2005 because his home was in Vancouver, and he did not have transportation to get to the hearing in Surrey at 9:00 a.m..
11. The Delegate noted that the appeal submission of Mr. Jaspal did not contain any grounds for appeal, and the appeal was without merit “in both form and substance”. It was the contention of the Delegate that nothing in the appeal submission of the appellant supported a finding that the Director had erred in law, or that there had been any errors of fact which would amount to an error in law.
12. The Delegate suggested that Mr. Jaspal may have been requesting an oral hearing because he sought to provide evidence which he had not been able to present at the complaint hearing because of his non-attendance. It was submitted that there was no failure to observe the principles of natural justice in making the Determination.
13. It was further argued by the Delegate that there was nothing in the appellant’s submission to indicate that evidence had become available which was not available at the time the Determination was made. According to the Delegate, the appellant merely sought to introduce his version of the events regarding his alleged employment relationship with S.G. Roofing Ltd.

ANALYSIS

14. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination. That section provides as follows:
 - 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
15. While the Appeal Form submitted by Mr. Jaspal does not specifically identify on which of the above grounds the appeal is based, I will nonetheless consider whether the appeal should be allowed under any of the prescribed grounds. The Tribunal has previously held that, considering the nature and purposes of the legislation, a common sense approach should be taken, and the substance of appeals which are filed should be considered, as opposed to the form. (see *J.C. Creations Ltd, (c.o.b. as Heavenly Bodies Sport)*, BC EST #RD317/03 (Reconsideration of BC EST #D132/03)).
16. The burden of establishing an error in the Determination rests with the appellant. The grounds for appeal are set out in s.112 of the *Employment Standards Act*. A Tribunal may not set aside findings of fact

made by a delegate for the Director unless, in reaching conclusions, the delegate for the Director erred in law or failed to observe the principles of natural justice; or the Tribunal finds that new evidence has become available that was not available at the time the Determination was made.

17. Mr. Jaspal did not dispute that he had received notice of the hearing. Once a party is given a notice of hearing, the onus is on that person to make appropriate arrangements for transportation to the hearing. If the party is unable to attend at the appointed time, it is up to that party to apply for an adjournment of the hearing. In this case, it appears that Raj K. Jaspal did not advise the Delegate in advance of the hearing that he would be unable to attend, and did not apply for an adjournment of the hearing before the Delegate.
18. In *Re: British Columbia, the Director of Employment Standards*, BC EST #D051/98 the Tribunal considered the matter of non-attendance of a party and wrote in part as follows:

The non-attendance of a party does not change the onus, which remains on the Appellant to demonstrate error or a basis for the Tribunal to vary, cancel or confirm a Determination. As a matter of evidence, however, a non-attending party takes the risk that the attending party will tender sufficient and weighty evidence for the Appellant to have met its tactical burden to persuade an Adjudicator to vary or cancel a Determination. A party who fails to appear at a hearing does take a risk that information or evidence helpful to the Adjudicator may not be available to the Adjudicator. This proposition applies equally to an Employer, and Employee or the Director's delegate. In the case of an Appellant, non-attendance is generally fatal to an appeal. In the case of any other party, the non-attendance may or may not be fatal, depending on the circumstances of the case, the issues on appeal and whether the appellant meets the persuasive or tactical burden.
19. There is no evidence of a denial of natural justice or an error in law on the Appeal Form, or in the material filed with this appeal. Mr. Jaspal submitted two handwritten letters in connection with his appeal. Clearly, Mr. Jaspal takes issue with the findings which were made by the Delegate in the Determination. However, there was no evidence adduced, and no submissions were made to support the assertion that the Delegate had failed to observe the rules of natural justice or had erred in law.
20. The Delegate conducted an oral hearing and, based on what is written in the Determination, she reviewed and gave consideration to the information Mr. Jaspal did provide in support of his complaint. The Delegate determined that the sworn verbal testimony given by Harjinder Gill of S.G. Roofing Ltd. should be accepted over the evidence provided by Mr. Jaspal, which she found was lacking supporting information and detail.
21. There is no evidence of a denial of natural justice, or an error in law.
22. I turn now to the ground of appeal that there was new evidence which was not available at the time the Determination was made. *Bruce Davies and others, Delegate for the Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Delegate for the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- the evidence must be relevant to a material issue arising from the complaint;

- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Delegate for the Director to a different conclusion on the material issue.

23. There is no information in the written submissions of Mr. Jaspal as to why the information in question would not have been available, or could not have been submitted to the Delegate for the Director prior to the hearing.

24. The appellant also did not show that the new evidence had high probative value. In other words, I was not persuaded that the information put forward by Mr. Jaspal with his appeal would have led the Delegate to a different conclusion, if she had the opportunity to consider the evidence before making the Determination.

25. I cannot find that Raj K. Jaspal has satisfied the test set out above in the *Bruce Davies* case for new evidence to be considered.

26. It has not been established that there is any basis for setting aside the Determination and, accordingly, this appeal is dismissed.

ORDER

27. Pursuant to Section 115 of the *Act*, the Determination dated February 13, 2006 is confirmed.

Carol Ann Hart
Member
Employment Standards Tribunal