

An appeal

- by -

Devendra Narayan

- 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.: 2012A/41

DATE OF DECISION: July 3, 2012

DECISION

SUBMISSIONS

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| Devendra Narayan | on his own behalf |
| Mogomotsi Madisa | on his own behalf |
| Joy Archer | on behalf of the Director of Employment Standards |

OVERVIEW

1. This is an appeal by Devendra Narayan, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued March 22, 2012.
2. Mr. Narayan was an owner/operator of a vehicle contracted out to Greyhound Canada Transportation Corp. (“Greyhound”). Following an injury and with Greyhound’s permission, Mr. Narayan hired Mogomotsi Madisa as a relief driver from July 7, 2010, until January 14, 2011. On February 21, 2011, Mr. Madisa filed a complaint with the Director alleging that Mr. Narayan had contravened the *Act* in failing to pay regular wages and for requiring him to pay Mr. Narayan’s business costs.
3. Following an investigation into Mr. Madisa’s complaint, the Director concluded that Mr. Narayan had contravened sections 18, 58 and 21 of the *Act* in failing to pay wages, annual vacation pay and for requiring Mr. Madisa to pay his business costs. The Director’s delegate determined that Mr. Madisa was entitled to wages, costs and accrued interest in the total amount of \$2,959.46. The Director also imposed four administrative penalties in the total amount of \$2,000 for the contraventions as well as a contravention of section 46 of the *Employment Standards Regulation* (failure to produce employer records), for a total amount payable of \$4,959.46.
4. Mr. Narayan contends that the Director failed to observe the principles of natural justice in making the Determination and seeks to have it varied. Although Mr. Narayan states that he is willing to pay Mr. Madisa’s WCB and Cargo Insurance costs he seeks to have the Determination in all other respects cancelled. Mr. Narayan also sought a suspension of the Determination pending the appeal. The Tribunal denied the suspension application on June 13, 2012. (BC EST # D059/12).
5. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This decision is based on the written submissions of the parties.

ISSUE

6. Whether or not the Director failed to observe the principles of natural justice in making the Determination.

FACTS

7. At issue between the parties was whether or not Mr. Madisa was entitled to regular wages and whether or not Mr. Madisa was entitled to reimbursement for employer deductions. Although Mr. Narayan initially took the

position that Mr. Madisa was a subcontractor, he conceded during the hearing that Mr. Madisa was an employee.

8. After considering the information provided by the parties, the delegate concluded that Mr. Madisa was entitled to additional wages. The delegate noted that although Mr. Narayan had not maintained any employer records, he agreed that he initially paid Mr. Madisa the amount of \$150 per day. Mr. Narayan agreed that he later reduced this amount to \$130 per day without Mr. Madisa's agreement. The delegate also found that Mr. Madisa had not been paid for 6 additional days in January. The delegate concluded that Mr. Madisa was entitled to wages in the total amount of \$1,450.
9. The parties agreed that Mr. Madisa paid for his own insurance and WCB premiums. The delegate found this arrangement to be a contravention of section 21 of the *Act* which prohibits an employer's cost of business to be borne by an employee. The delegate determined that Mr. Madisa was entitled to an additional \$632.47 for these payments.

ARGUMENT

10. Mr. Narayan says that Mr. Madisa's daily wage included tax and vacation pay. He also contends that Mr. Madisa agreed to pay his own WCB. Mr. Narayan further submits that he paid Mr. Madisa a full day pay for the months of December and January but that Mr. Madisa worked only one half days during this period. Mr. Narayan further asserts that Mr. Madisa refused to provide him with his SIN because he wanted to be paid in cash.
11. Mr. Narayan also contends that Mr. Madisa received a number of tickets for parking illegally which Mr. Narayan was required to pay, and that he used Mr. Narayan's vehicle to service other Greyhound routes for which he was paid by other drivers.
12. Finally, Mr. Narayan says that he has received a number of customer complaints about being overcharged by Mr. Madisa and that he has had to refund Greyhound for the charges.
13. The delegate submits that Mr. Narayan has failed to demonstrate that the Director failed to observe the principles of natural justice. She contends that Mr. Narayan's appeal is an attempt to re-argue information he already presented to the Director during the investigation. She further notes that Mr. Narayan has attempted to present information to the Tribunal that he did not bring to the delegate during the investigation.
14. The delegate seeks to have the Determination confirmed.
15. Mr. Madisa also contends that all of the issues raised by Mr. Narayan were addressed "thoroughly and elaborately" during the hearing. In particular, Mr. Madisa says that although Mr. Narayan accused him of stealing, he provided no evidence of that during the hearing. Mr. Madisa says that he has suffered a great deal of stress and humiliation attempting to deal with Mr. Narayan's false accusations and seeks to have the appeal dismissed.
16. In a reply submission, Mr. Narayan says that if the Tribunal "thinks [he] should be paying for [Mr. Madisa's] WCB and Cargo Insurance", he will pay it. Mr. Narayan says that this is the first time he has employed anyone and he should not be penalized for contravening the *Act*. He says that he is self-employed and is unable to afford the penalty assessment.

ANALYSIS

17. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was made.
18. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
19. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Although Mr. Narayan alleges a failure to comply with principles of natural justice as the ground of appeal, the written submissions have no bearing on that ground of appeal.
20. I am satisfied that Mr. Narayan was aware of the details of the complaint and had full opportunity to respond to the complaint. The record indicates that Mr. Narayan submitted a significant number of documents to the Director in support of his position.
21. There is no evidence Mr. Narayan was denied natural justice and I find no basis for his appeal on this basis.
22. In essence, Mr. Narayan's appeal is largely a re-statement of arguments he made before the delegate. Those arguments were considered and dealt with by the delegate at first instance and I find no basis to interfere with her conclusions.
23. The delegate submits that Mr. Narayan has submitted information and arguments on appeal that were not presented during the investigation. While Mr. Narayan has not appealed on the basis that there is new and relevant evidence, the Tribunal has long held that a party cannot "sit in the weeds", failing or refusing to participate in a hearing or comply with Demands for records and then file an appeal when they disagree with the resulting Determination. (see *Tri-West Tractor Ltd.* (BC EST # D268/96)). None of this information meets the Tribunal's test for new evidence, and I find no basis for allowing the appeal on this ground.
24. Mr. Narayan also contends that the Director ought not to have imposed administrative penalties given that he did not try to contravene the *Act* and that he is a first time employer. In *Acton Super-Save Gas Stations Ltd.* (BC EST # D067/04) the Tribunal concluded that the *Act* provides for mandatory administrative penalties without any exceptions: "The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme." Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed.
25. The appeal is dismissed.

ORDER

26. Pursuant to section 115 of the *Act*, I order the Determination dated March 22, 2012, be confirmed in the amount of \$4,959.46, together with any interest that has accrued under Section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal