Employment Standards TRIBUNAL

An appeal

- by -

Joseph Desjarlais
("Desjarlais")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/34

DATE OF DECISION: May 12, 2004

DECISION

SUBMISSIONS

Joseph Desjarlais	on his own behalf
Bruce Patterson	on behalf of The Master Plumber Ltd.
Robert D. Krell	for the Director of Employment Standards

OVERVIEW

This is an appeal filed by Joseph Desjarlais ("Desjarlais") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Mr. Desjarlais appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on February 3rd, 2004 (the "Determination").

Following an oral hearing held on January 13th, 2004, the Director's delegate issued the Determination and accompanying "Reasons for the Determination". The delegate dismissed the unpaid wage complaint Mr. Desjarlais filed against his former employer, The Master Plumber Ltd. ("Master Plumber").

By way of a letter dated April 22nd, 2004 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). I have before me the written submission of Mr. Desjarlais that was appended to his appeal form and a one-page submission dated March 11th, 2004 from Mr. Bruce Patterson on behalf of Master Plumber. I also have a 2-page submission from the delegate, dated March 16th, 2004 and the section 112(5) "record" that was before the delegate.

THE DETERMINATION

The dispute between the parties concerned whether or not Master Plumber hired Mr. Desjarlais with a "wage guarantee". Mr. Desjarlais testified before the delegate that Master Plumber "guaranteed" his work-week would consist of not less than 40 working hours. Mr. Desjarlais quit his job after 17 days and was paid for the hours that he actually worked (approximately 4.4 hours per day). However, he claimed unpaid wages based on the alleged 40-hour per week "guarantee".

Master Plumber's position, given in evidence by Mr. Patterson, was that Mr. Desjarlais was not promised or guaranteed a 40-hour work-week but, rather, that his work-week would, over time, build to 40 hours (with additional overtime pay after 40 hours) as the new "Master Electrician" division of the business developed and prospered.

The delegate concluded that "there is not enough evidence before me to prove the employment agreement between Master Plumber and Mr. Desjarlais contained a term and condition of employment guaranteeing Mr. Desjarlais a minimum of 40 hours work or wages each week" (Reasons at p. 4). The delegate also noted the "evidence of a guarantee to be sparse" and concluded: "In the absence of written, or other

evidence of clarity I am not persuaded that the parties contemplated or agreed to such a term and condition of employment" (p. 4).

ISSUES ON APPEAL

Mr. Desjarlais appeals the Determination on the ground that he has new evidence that was not available at the time the Determination was being made [section 112(1)(c) of the *Act.* However, it is not at all clear to me that this latter ground represents the actual basis of Mr. Desjarlais' legal challenge to the Determination.

Mr. Desjarlais particularized his section 112(1)(c) ground as follows: "I was not given sufficient time to decipher the documentation presented at the adjudication hearing by Master Plumber". I consider this allegation to be more properly an assertion that he was denied natural justice [section 112(1)(b)].

Mr. Desjarlais also asserts in his appeal form that the witness for Master Plumber "lied" on several occasions and I presume Mr. Desjarlais is in effect saying that this evidence was unreliable and should have been rejected by the delegate—arguably (and I put it no more strongly than that), an allegation of error of law [section 112(1)(a)].

THE PARTIES' SUBMISSIONS

Mr. Desjarlais

Mr. Desjarlais' fundamental position is that Mr. Patterson is "deceitful" and a "liar". Mr. Desjarlais says he had a "handshake deal" with Mr. Patterson whereby he would work and be paid for not less than 40 hours each week from the outset of his employment. Mr. Desjarlais has identified several of what he says are "discrepancies" in Mr. Patterson's evidence which should lead one to reject Mr. Patterson's evidence as an unreliable fabrication.

Master Plumber

Mr. Patterson's states, on behalf of Master Plumber, that if anyone is lying it is Mr. Desjarlais and that, in any event, Mr. Desjarlais had plenty of time to review documents and to otherwise prepare his case before the delegate. Mr. Patterson vigorously asserts that he never agreed to "guarantee" Mr. Desjarlais 40 hours of work each week commencing from the outset of his employment.

The Director's delegate

The delegate, in his submission, notes that he did receive certain Master Plumber payroll records into evidence at the hearing. The delegate also stated that at the conclusion of the hearing, both parties confirmed that they had presented all of their evidence. Finally, the delegate stated that a few days after the hearing concluded, some further documentary evidence was forwarded to the delegate by Mr. Desjarlais. The delegate states that he did not review or consider this material and that it remains "sealed in an envelope".

FINDINGS AND ANALYSIS

New Evidence

Mr. Desjarlais appended certain documents to his appeal form including an undated letter to the delegate and some other documents such as a record of employment and copies of cheques. None of this evidence qualifies as "new evidence" since all of it was available and could have been placed before the delegate at the January 13th hearing. I note, further, that the parties were given an opportunity to present all of their evidence to the delegate on January 13th, and that both parties confirmed, at the conclusion of the hearing, that they had no further evidence to submit. There is no merit to this ground of appeal.

Other Issues

Each party contends that the other is being untruthful. Clearly, the delegate had to make certain findings based on the credibility of the parties and based on the materiality of the evidence before him. I have not considered any other documents beyond those contained in the record. The additional "new evidence" tendered by Mr. Desjarlais is not properly admissible in this appeal for the reasons noted above.

The material in the record does not unequivocally indicate the parties agreed, at the outset of the employment relationship, that Mr. Desjarlais would work (and be paid for) not less than 40 hours each week. The record includes an HRDC job posting that refers to a "permanent, full time" position and one might infer from that posting that the job entailed a 40-hour week. Further, the wage rate for the position is stated to be "negotiated".

A second job posting (also contained in the record) was more specific, referring to a $23 per hour wage rate for a 40 hour work-week. On the other hand, these two posting are HRDC documents, and were not prepared by Master Plumber. Both postings specifically indicated that the information may not be reliable, accurate or current. I note that Mr. Desjarlais says that he was to be paid $20 per hour not $23 which, of itself, is some evidence that the posting was not entirely accurate. Clearly, however, and in any event, neither posting constitutes a general "offer" of employment or reliable evidence of the terms of the parties' employment contract.

I agree with the delegate's conclusion that the two postings have little, if any, probative value in terms of the dispute between the parties. There are no other documents in the record that would shed any further light on the parties' actual agreement with respect to the number of hours to be worked each week. Mr. Desjarlais says he had a 40-hour per week guarantee. Mr. Patterson says that he clearly advised Mr. Desjarlais that since the business was just getting underway, the weekly hours would vary with the available work and would increase to 40 or even more hours per week but only as the business matured.

Thus, and in light of the parties' mutually exclusive positions, the dispute turned on the documentary evidence that might support one or the other of the parties' conflicting oral testimony. The delegate found that Mr. Desjarlais' position was not sufficiently corroborated by other independent evidence and it must be remembered that Mr. Desjarlais bore the burden of proof before the delegate.

As noted above, each party continues to accuse the other of being untruthful. The delegate heard the two parties and, having done so, was unable to conclude, on balance, that there was in fact an initial "wage agreement" based on a minimum 40-hour work-week. I am unable to conclude, based on the material

before me, that the delegate clearly erred in reaching that conclusion. Accordingly, the appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal