

An appeal

- by -

Prince Electric Ltd.
("Prince Electric")

- 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: David B. Stevenson

FILE No.: 2005A/43

DATE OF DECISION: May 27, 2005

DECISION

SUBMISSIONS

Harbans Grewal	on behalf of Prince Electric Ltd.
Harjit Singh Gill	on his own behalf
Ravi Sandhu	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Prince Electric Ltd. (“Prince Electric”) of a Determination that was issued on March 16, 2005 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Prince Electric had contravened Part 3, Section 18, Part 5, Section 46 and Part 7, Section 58 of the *Act* in respect of the employment of Harjit Gill and ordered Prince Electric to pay Harjit Gill an amount of \$9,398.63, an amount which included wages and interest.

The Director also imposed an administrative penalty on Prince Electric under Section 29(1) of the *Employment Standards Regulation* (the “*Regulations*”) in the amount of \$1500.00.

The total amount of the Determination is \$10,898.63.

Prince Electric appeals the Determination in the ground that evidence has become available that was not available at the time the Determination was being made. Prince Electric seeks to have the Determination cancelled. The attachment to the appeal form filed by Prince Electric provides the following submission in support of the appeal:

The company is enclosing 2 pages written by Harjit Gill indicating the actual hours worked by the employee. The employee was paid for 40 hours per week. The understanding between the company and the employee was the employee was to work the extra hours off in the year 2004. That is why one of the two witnesses confirm the [sic] Harjit Gill worked in 2004.

Quite apart from whether such an arrangement as described can survive the prohibition found in Section 4 of the *Act*, the above submission, and the accompanying two pages referred to, does far more than seek to have the Tribunal review the correctness of the Determination based on the presentation of evidence that was not available to the appellant at the time the Determination was made. In substance, this appeal challenges the correctness of the conclusion of the Director that Harjit Gill performed a substantial amount of work for Prince Electric during a period from early January to the end of May 2004 as an employee and was not paid wages for most of that work.

The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issues in this appeal are whether Prince Electric has shown any error in the Determination that would justify the intervention of the Tribunal under Section 115 of the *Act*.

THE FACTS

Prince Electric is an electrical contractor. Harjit Gill worked for Prince Electric as an apprentice electrician. He commenced his employment on July 14, 2003 and continued to perform work for Prince Electric until May 31, 2004. There was no issue that he was an employee of Prince Electric for a period from July 14 to December 19, 2003, performed and was paid wages. During the complaint process, Prince Electric provided the Director with payroll records and cancelled cheques showing Harjit Gill had worked during this period at a wage rate of \$14.00 an hour.

Harjit Gill complained that he had not been paid by Prince Electric for all wages earned for a period from January 7, 2004 to May 31, 2004 (the “claim period”).

In response to the complaint, Prince Electric took the position that Harjit Gill was not an employee of Prince Electric after December 19, 2003 and, more specifically, was not an employee and had not worked for Prince Electric during the claim period. Prince Electric explained a cheque paid to Harjit Gill on March 24, 2004 in the amount of \$1500.00 as a personal loan from Prince Electric to him.

During the complaint process, the Director received information from Harjit Gill and from two independent sources who confirmed aspects of Gill’s claim.

Prince Electric, apparently, provided little information and was not particularly cooperative. The information provided to the Director primarily applied to the period July 14 to December 19, 2003. In the Determination, the Director notes the following:

On January 10, 2005 a letter outlining the preliminary findings of the investigation was sent to Prince. The letter requested that the employer respond by January 24, 2005.

On January 24, 2005 Prince responded by requesting a copy of Gill’s calendar as well as the list of work locations and stated they would respond to the preliminary findings once they received this information. The requested information was faxed to Prince on January 27, 2005 and they were asked to respond by February 11, 2005. On February 10, 2005 Prince requested a further extension to provide their response. An extension was granted to March 1, 2005.

Prince did not submit any response by March 1, 2005. On March 2, 2005, Grewal, of Prince was contacted and informed that the response date had passed without any submission. Grewal requested a further extension. It was explained that two extensions had already been granted and Prince had a reasonable amount of time to reply. For this reason a further extension would not be granted. Grewal was informed that a decision would be made based on the evidence submitted to date.

The Director found that Harjit Gill was an employee of Prince Electric during the claim period, that he had worked a total of 678.75 hours for Prince Electric during that period, had received wages in the amount of \$1500.00 during the period and was owed additional wages, including regular wages, overtime, statutory holiday pay and annual vacation pay.

ARGUMENT AND ANALYSIS

Prince Electric has the burden of persuading the Tribunal there is a reviewable error in the Determination. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

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 made.*

In this appeal, Prince Electric says there is evidence that has become available that was not available when the Determination was made. The Tribunal has taken a relatively strict view of this ground of appeal, indicating in several decisions that it is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal retains a discretion to allow new evidence. In addition to considering whether the evidence was reasonably available and could have been provided during the complaint process, the Tribunal also considers whether the evidence is relevant to a material issue arising from the complaint and if it is credible, in the sense that it be reasonably capable of belief.

The Director and Harjit Gill have filed replies to the appeal in which they object, among other things, to the evidence provided with the appeal. The Director submits the evidence which Prince Electric seeks to submit was available and could have been submitted prior to the Determination being made. Harjit Gill makes the same point as the Director, adding that the evidence provided to the Tribunal is incomplete and misleading.

The evidence which Prince Electric seeks to have the Tribunal consider consists of four hand-written pages which Prince Electric says were written by Harjit Gill and given to them, showing the actual hours worked by Harjit Gill from July 28 to December 20, 2003. It is clear this evidence was available to Prince Electric and could have been provided to the Director during the complaint process. Prince Electric has not said otherwise. This circumstance alone would justify the Tribunal refusing to accept this evidence on appeal.

There are, however, several other concerns with this evidence which justify the Tribunal not accepting this evidence. The evidence contradicts the payroll records provided by Prince Electric to the Director during the complaint process and is inconsistent with other representations made by Prince Electric about Harjit Gill's employment in 2003. That inconsistency is not explained. The evidence appears to be incomplete, as it does not cover the full term of Harjit Gill's employment in 2003. There is insufficient information in the four pages to allow any conclusion about whether Harjit Gill was, as alleged, paid for more hours than he worked. As an example, I note there are several days and weeks showing Harjit Gill worked more than 8 hours in a day and more than 40 hours in a week. Not surprisingly, the payroll records, which were prepared by Prince Electric and presented to the Director with the representation that Harjit Gill worked a regular 40 hours a week, do not show overtime worked or paid. As indicated earlier, an agreement or understanding that Harjit Gill would "work off" monies advanced to him (the existence

of which is denied by Harjit Gill) is prohibited by both Section 4 and Section 21 of the *Act*. If it is being suggested in this appeal that the Director could have “set off” some perceived overpayment of wages in 2003 against wages owed for the claim period, these provisions would have, in any event, prevented the Director from doing that.

Finally, the indication in the Determination that Prince Electric failed or refused to fully participate in the complaint process also militates against the introduction of the additional evidence, and against the appeal generally. It is well established that the Tribunal will normally refuse to allow a party that has failed or refused to participate or cooperate with an investigation to introduce evidence on appeal that should have been provided during the investigation process (see *Tri-West Tractors Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97).

For the above reasons, I will not allow the new or additional evidence. As there is no other ground of appeal identified or argued, Prince Electric has not satisfied the burden of showing there is a reviewable error in the Determination. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 16, 2005 be confirmed in the total amount of \$10,898.63, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal