

An appeal

- by -

Mike Elliot

- 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: John Savage

FILE No.: 2006A/57

DATE OF DECISION: July 13, 2006

DECISION

SUBMISSIONS

Mike Elliott, for himself

Ed Wall, for the Director of Employment Standards

BACKGROUND

1. On February 22, 2006, Jess R. Huizinga (“Huizinga”) filed a complaint under the *Employment Standards Act*, RSBC 1996, C.113, (the “Act”) alleging that Mike Elliot (“Elliot”) contravened the Act by failing to pay wages owing.
2. According to Huizinga, Elliot employed him to roof a house. Elliot acknowledges that he hired Huizinga, but says that it was only to help him roof a house for a friend for cash. Elliot therefore did not keep payroll records.
3. The Delegate conducted an investigation, issued a demand for payroll records by certified mail that went unclaimed, and after contact with Elliot concluded in his Determination that Huizinga was an employee of Elliot with unpaid wages. Administrative penalties were imposed for two breaches of the *Act*.
4. Although the Appeal Form indicates that the ground of appeal is that the Director erred by failing to observe the principles of natural justice in making the Determination, the appeal submission focuses on the fact that Elliot is an individual and not a company. In the course of the submission, Elliot acknowledges that some money is owed Huizinga; although he disputes the amount.
5. The Tribunal determined that it would hear the appeal by way of written submissions.

ISSUES

6. There are four issues in the appeal:
 - 1) Was there a breach of natural justice in the procedure followed by the Delegate?
 - 2) Did the Delegate err in law in finding that Elliot was required to maintain payroll records?
 - 3) Did the Delegate err in law in imposing on administrative penalties on Elliot?
 - 4) Did the Delegate err in law in determining the amount due Huizinga?

BREACH OF NATURAL JUSTICE

7. Although this ground of appeal is checked on the Appeal Form, the two submissions of Elliot fail to address this ground. Since Elliot was notified of the investigation and participated in it; although, perhaps, reluctantly; I can find no breach of natural justice in the circumstances.

OBLIGATION TO PROVIDE EMPLOYEE RECORDS

8. In this case Elliot hired Huizinga to work for him roofing a house. It is clear that Elliot had control and gave direction to Huizinga and Huizinga was employed by Elliot.
9. In his submission to this Tribunal, Elliot admits that he did not maintain employee records. He says that because he does not have a company he does not have employee records.
10. The obligation to maintain employee records is found in section 28 of the *Act*. The records that are required to be kept include under subsection 28(1)(d) “the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis”.
11. It is an employer that is obligated to maintain employee records. The term “employer” is defined very broadly in subsection 1(1) of the *Act* to include “...a person ... who has or had control or direction of an employee....” The term “person” is not defined in the *Act* but in its natural and ordinary meaning includes a natural person.
12. It follows that incorporation is not a requirement or necessary condition for being an employer under the *Act*. This ground of appeal therefore fails.

ADMINISTRATIVE PENALTIES

13. The Delegate imposed two administrative penalties on Elliot.
14. The first administrative penalty was imposed for failing to produce or deliver to the director records as and when required.
15. The Delegate provided evidence of a demand for such records and evidence that such demand was delivered to the last known address of Elliot. Elliot in one part of his submission says that he had no records. In another part of his submission, he says that he wrote down the hours worked by Huizinga and the hours claimed do not correspond to the hours worked. From the latter statement I infer that Elliot did write down the hours that Huizinga worked and that this writing should have been produced. I would note, however, that even if Elliot had no records this would be contrary to his obligation under section 28 of the *Act*. In either case, a breach of the *Act* is made out.
16. The second administrative penalty was for failing to pay wages within 48 hours as required by section 18(1) of the *Act*. In his own submission Elliot acknowledges that some wages were due Huizinga. Section 29 of the *Employment Standards Regulation*, B.C. Regulation 396/95, imposes penalties on “a person who contravenes a provision of the *Act* or this regulation, as found by the director in a determination made under the *Act*....” Elliot in his submission acknowledges that some wages are due.

As the director has found in the Determination appealed that Elliot failed to pay wages, the basis for imposing this administrative penalty is made out.

AMOUNT DUE

17. There is some dispute over the amount due. The Delegate found that Huizinga was owed \$464 based on the hours worked as reported by Huizinga. Elliot submitted that only \$204 was due. The issue of the number of hours worked is an entirely factual issue. The Delegate preferred the evidence of Huizinga over that of Elliot. There is no error of law in making such a finding.

SUMMARY AND ORDER

18. The appeal is dismissed and pursuant to section 115 of the *Act*, the Determination of the Director is confirmed.

John Savage
Member
Employment Standards Tribunal