

An appeal

- by -

Edward Clearwater
("Clearwater")

- 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2002A/4

DATE OF DECISION: March 11, 2003

DECISION

INTRODUCTION

This is an appeal filed by Edward S. Clearwater (“Clearwater”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Clearwater appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on December 5th, 2002 (the “Determination”).

By way of a letter dated February 7th, 2003 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).

BACKGROUND INFORMATION

Mr. Clearwater originally filed a complaint alleging that his former employer, Replica Aircraft Works Inc. (“Replica”), owed him unpaid wages earned during the period July 16th to August 21st, 2001. Mr. Clearwater asserted that he attended a training program in order to learn to built wooden aircraft but did not provide the delegate with any specific information about the days or hours worked. Replica, for its part, maintained that Mr. Clearwater was never employed by the firm.

The delegate, after noting that she had requested--by way of three separate letters dated August 19th, September 9th and November 22nd, 2002--“detailed information regarding his claim for unpaid wages”, dismissed the complaint on the basis that “Mr. Clearwater has not provided any substantive evidence to confirm that he is owed any quantity of wages by Replica” (Determination, p. 2)

THE APPEAL

Mr. Clearwater appeals the Determination under section 112(1)(c) of the recently-amended *Act* on the ground that “evidence has become available that was not available at the time the determination was being made”. More specifically, Mr. Clearwater says:

“I was not fully educated on the answers to my questions from one [the delegate] after getting the same ending from one [another delegate] who are Employment Standards + Industrial Relations Officers; I have all the information they did not direct ME on or investigate! Let’s get it investigated + taken care of real soon > smoothley! It should of been an easy effort!” [sic]

It is not immediately apparent from the foregoing what particular “new evidence” Mr. Clearwater is relying on in support of his appeal. Nor is it clear whether that evidence, whatever form it might take, was unavailable at the time the Determination was being made.

I do have before me some documents that were apparently filed with the Tribunal by Mr. Clearwater, however, none of those documents appears to constitute “new evidence” in the sense of being unavailable on or before the date when the Determination was issued.

FINDINGS

Replica has not filed any submission with the Tribunal. The only other material I have before me is a submission dated January 9th, 2003 from the delegate. This latter submission consists of a 2-page letter and several attached documents. The delegate's principal position is that none of the documents submitted to the Tribunal by Mr. Clearwater was provided to the delegate during her investigation even though three separate requests were made for such information. There is a great deal of merit to that submission.

Further, and in any event, I note that none of the documents now relied on by Mr. Clearwater could be said to constitute "new evidence". These documents show that Mr. Clearwater applied to a program jointly administered by Replica and Malaspina University College (Duncan campus) which was designed to train individuals for the wooden aircraft fabrication industry. The tuition for the program (\$6,000) was to be paid by the student to Malaspina and so far as I can gather, upon the successful completion of the 14-week "pre-employment training" program Mr. Clearwater would have commenced employment with Replica. Although he was apparently accepted into the program, he apparently did not complete the program and he was thus never offered an employment position with Replica. The documents submitted to the Tribunal, including brochures and newspaper advertisements with respect to the program, were all in hand or otherwise available well before the Determination was issued and I have no explanation before me regarding why Mr. Clearwater failed to provide these documents to the delegate.

Although it does not appear that an employment relationship ever existed between Mr. Clearwater and Replica I need not rest my decision on that basis. This appeal must be dismissed for the simple reason that no new evidence, as defined in section 112(1)(c) of the *Act*, has been provided to the Tribunal.

ORDER

The appeal is dismissed on the basis that the appellant has not satisfied the ground of appeal set out in section 112(1)(c) of the *Act*. Accordingly, and pursuant to section 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal