

An appeal

- by -

575158 B.C. Ltd. carrying on business as Pro Gas and Heating
(the “Appellant” or “Pro Gas and Heating”)

- 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-Ann Hart

FILE No.: 2010A/73

DATE OF DECISION: August 10, 2010

DECISION

SUBMISSIONS

Eddie Lowe	on behalf of 575158 B.C. Ltd. carrying on business as Pro Gas and Heating
Seyed Jafar Seifi Hessar	on his own behalf
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by 575158 B.C. Ltd. carrying on business as Pro Gas and Heating (the “Appellant” or “Pro Gas and Heating”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of a Determination of the Director of Employment Standards (the “Director”) issued on April 15, 2010 (the “Determination”).
2. The Appellant contends that the Delegate for the Director (the “Delegate”) failed to observe the principles of natural justice in making the Determination, and erred in law; and that new evidence has become available that was not available at the time the Determination was being made.

BACKGROUND

3. A complaint was filed with the Employment Standards Branch by Seyed Jafar Seifi Hessar under section 74 of the *Act* alleging that Pro Gas and Heating had failed to pay him regular wages, overtime pay, statutory holiday pay and vacation pay. From June 3, 2008, to September 15, 2008, Mr. Hessar worked as a service man (gas fitter (C)) for 575158 B.C. Ltd. carrying on business as Pro Gas and Heating, which operates a furnace installation business. His hourly rate of pay was \$20.00 per hour.
4. As Pro Gas and Heating did not participate in the investigation, the Delegate issued the Determination solely on the basis of information presented to the Delegate by Mr. Hessar.
5. In the Determination, the Delegate found that Mr. Hessar was not paid for hours worked from August 25 to 30, 2008. He was also not paid for all of the hours he worked from August 31 to September 15, 2008. The Delegate concluded that a total of \$2,560.00 in wages, \$752.30 in commissions for the sale of products and merchandise, \$3,875.00 in overtime pay, statutory holiday pay of \$303.26, and vacation pay of \$609.26, were owing to Mr. Hessar. In addition, four administrative penalties of \$500.00 each for contraventions of sections 17, 18, 45 and 46 of the *Act* were imposed by the Delegate under section 29 of the *Employment Standards Regulation*.

ISSUES

6. The issues in this case are the following:
 1. Did the Delegate fail to observe the principles of natural justice in making the Determination?
 2. Is there new evidence which was not available at the time the Determination was made?
 3. Did the Delegate err in law in making the Determination?

ARGUMENT

For Pro Gas and Heating

7. Mr. Lowe maintained that he had never received any documents from the Employment Standards Branch or Mr. Hessar. He indicated that he had only become aware of the complaint of Mr. Hessar when he went to his former lawyer's office in connection with an on-going divorce action. Mr. Lowe wrote that the post office had problems with vandalism of the mail boxes at the end of his street. Mr. Lowe submitted that the Delegate did not have any proof that he had received the registered mail in question, as the Canada Post documentation provided indicated "Customer address error found".
8. The Appellant contended that with respect to Exhibit 3 submitted by the Delegate, the signature name was incorrectly noted. Mr. Lowe maintained that he had always signed his name "E.T. Lowe", and not "E. Lowe", as indicated on the Canada Post tracking documentation. Mr. Lowe asserted that he would have participated and objected from the start if he had been aware of the complaint made by Mr. Hessar.
9. Mr. Lowe submitted that the *Employment Standards Act* did not apply in this case as Mr. Hessar was not an employee. None of the documentation provided by Mr. Hessar proved that he was an employee of 575158 BC Ltd.. Mr. Lowe contended that Mr. Hessar was hired through Craig's List as a self-employed gas contractor who was paid for his labour only, without deductions.

For Mr. Hessar

10. Mr. Hessar replied to each the arguments of the Appellant, asserting that he was an employee, and not an independent contractor, as Pro Gas and Heating had maintained. He attached Work Order Invoices, Dispatch Invoices, and other documentation to demonstrate that he was an employee of Pro Gas and Heating.

For the Director

11. The Delegate submitted that the Appellant had failed to provide convincing arguments or sufficient evidence to support the allegation that the Delegate had erred in law.
12. The Delegate maintained that the Appellant had been given notice of, and the opportunity to respond to, the allegations made by Mr. Hessar. Pro Gas and Heating did not respond to the Demand and letters sent by the Delegate, despite having been served in accordance with the *Act*. The Delegate submitted that after failing to participate or cooperate in the investigation, Pro Gas and Heating could not now appeal the conclusions reached in the investigation (*Tri-West Tractor Ltd.*, BC EST # D268/96; and *Kaiser Stables Ltd.*, BC EST # D058/97).
13. The Delegate submitted that the argument that there was new evidence which was not available when the Determination was made should be dismissed. With respect to the new evidence sent in by Mr. Lowe with the appeal, the Delegate maintained that the Appellant could have provided all of this evidence during the investigation if he had acted diligently. Therefore, he should not be permitted to introduce new evidence on appeal. The Delegate submitted that, in any event, the Appellant had failed to meet the onus of proving that Mr. Hessar was not an employee.

Reply Submission for Pro Gas and Heating

14. A further written submission dated July 27, 2010, was provided by the Appellant. In that submission, Mr. Lowe replied in detail to each of the points raised by Mr. Hessar in his submission dated June 6, 2010. I also received a

copy of a letter dated July 29, 2010, written by Mr. Lowe to the Tribunal, with an attachment (a copy of a receipt for the repair of his laptop).

15. Although, for the sake of brevity, I have not referred to all of the evidence and submissions of the parties in this Decision, I have reviewed and considered all of the submissions received.

ANALYSIS

16. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision reads:

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 being made.

17. In this case, the Appellant has filed the appeal based on all of the grounds outlined in section 112.

18. Section 112(2)(b) of the *Act* requires that a person filing an appeal must deliver a copy of the request to the Director. The Appellant checked the box on the Appeal Form confirming that a copy of the appeal was delivered to the Director of Employment Standards. The evidence on the record and the submission of the Delegate indicate that the Director did not receive a copy of the request for appeal from the Appellant.

19. The potential consequence of a failure to comply with section 112(2) of the *Act* is set out in section 114 of the *Act*. Pursuant to section 114(1) of the *Act*, the Tribunal may dismiss all or part of the appeal where “(b) *one or more of the requirements of section 112(2) have not been met*”.

20. In this case, Pro Gas and Heating failed to participate in the Director’s investigation and has now failed to comply with the provision in the *Act* requiring it to deliver to the Director a copy of the request for appeal. Mr. Lowe did not address this matter in his submissions for this appeal. He did not dispute the Director’s assertion that the Director had not been provided with a copy of the request for appeal.

21. Despite this failure of the Appellant to comply with the *Act*, I have proceeded to decide each of the issues in this appeal. In the end result, I have dismissed this appeal, for a number of reasons, as set out below. Taking into account all of the circumstances of this case, I also consider the failure to comply with section 112(2) of the *Act* to be a valid reason to dismiss this appeal.

1. Did the Delegate fail to observe the principles of natural justice in making the Determination?

22. Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them, the right to present their evidence, and the right to be heard by an independent decision maker.

23. Section 77 of the *Act* requires that the Director make reasonable efforts to give a person under investigation an opportunity to respond.

24. The Canada Post tracking records provided by the Delegate show that a Demand for Employer Records was issued and sent, together with a copy of all documents provided to the Delegate by the complainant, by registered mail on June 8, 2009. Pro Gas and Heating was required to respond to the complaint and provide payroll records by June 22, 2009. Mr. Lowe is correct in his submission that the post office recorded a note dated June 12, 2009, as follows: “customer addressing error found; attempting to correct”. It appears that an error was made concerning the postal code for Mr. Lowe’s mailing and delivery address (and the address from which Pro Gas and Heating operated), and that the error was later corrected. The rest of the mailing and delivery address was, however, correctly indicated from the time the item was first sent out.
25. The Canada Post tracking records show that the item was again sent out for delivery on 16 June 2009, and that on July 5, 2009, the item had not been claimed by the recipient. On July 7, 2009, it was returned to the sender, marked as “unclaimed”.
26. On June 24, 2009, the Delegate sent another letter by regular mail to Mr. Lowe, attaching a copy of the letter he had previously sent dated June 8, 2009, and 48 pages of enclosures. The Delegate indicated in the letter dated June 24, 2009, that he was offering Mr. Lowe a final opportunity to respond no later than July 3, 2009. On July 7, 2009, the Delegate sent a further letter by regular mail providing a final opportunity to respond to the complaint by July 20, 2009, together with 37 pages of enclosures. According to the Delegate, the two packages sent by regular mail were never returned to the Employment Standards Branch.
27. On November 17, 2009, the Delegate sent to Mr. Lowe a letter by registered mail containing his “*Preliminary findings*” with respect to the complaint. The Canada Post tracking records show that the item was successfully delivered, and the signatory name “*E. Lowe*” appears as having signed for receipt of the letter on November 26, 2009.
28. The Appellant did not respond to any of the letters sent by the Delegate.
29. Section 122 of the *Act* is the relevant provision concerning service of a demands, notice or determination. That section provides as follows:
- Service of determinations, demands and notices**
- 122** (1) A determination or demand or a notice under section 30.1 (2) that is required to be served on a person under this Act is deemed to have been served if
- (a) served on the person, or
- (b) sent by registered mail to the person's last known address.
- (2) If service is by registered mail, the determination or demand or the notice under section 30.1 (2) is deemed to be served 8 days after the determination or demand or the notice under section 30.1 (2) is deposited.
30. If a person fails to pick-up registered mail, it is at his or her own peril where legislative deemed service provisions are applicable. (See the decision of the Supreme Court of B.C. in *Whitta v. McSheffrey*, Unreported, (August 15, 1995), Nanaimo Registry, No. S10398; and the decisions of the Tribunal in *Re #1 Low-Cost Moving & Hauling Ltd.*, BC EST # D484/02, and *Re Nature's Choice Foods Ltd.*, BC EST # D206/04). The consequences of section 122 of the *Act* cannot be avoided by failing, neglecting, or refusing to pick up registered mail.
31. Mr. Lowe maintained that there were problems with mailbox vandalism on his street. However, he did not provide any documentation to prove that all of the notices from Canada Post and the letters sent by regular mail by the Delegate may have gone missing.

32. The Appellant has provided insufficient evidence to rebut the presumption of service of the letter containing the preliminary findings of the Delegate. The name of the signatory “E. Lowe” on the Canada Post tracking document appears on the record. This is *prima facie* evidence that the document sent by registered mail was received by Mr. Lowe. In the face of that evidence, and the deemed service provisions in section 122 of the *Act*, the burden of proof is on the Appellant to establish that the document sent by registered mail was not, in fact, received.
33. Mr. Lowe provided no evidence to demonstrate that he was not the person who had signed for that item. He did not indicate who he believed might have signed for the documents or provide any other explanation as to what might have happened. There was no evidence concerning the requirements of Canada Post for acceptance of registered mail. I conclude on a balance of probabilities that on November 26, 2009, Mr. Lowe received the registered mail sent to him by the Delegate.
34. Finally, it is important to note that the evidence demonstrates that when the Delegate sent the Determination to the Appellant at the address at which Pro Gas and Heating operated, and Mr. Lowe’s mailing address and delivery address, the item was returned to the Employment Standards Branch as “*Refused*”.
35. The Appellant failed to offer a reasonable and credible explanation as to how all of the letters and notices sent by the Delegate were apparently not received.
36. In summary, the Delegate made considerable efforts to provide the Appellant with the opportunity to respond in the investigation. It was not established that the Delegate failed to observe the principles of natural justice in making the Determination.

2. Is there new evidence which was not available at the time the Determination was made?

37. New evidence is not new merely because a party failed to participate in the investigation (See: *Save Energy Walls Ltd.*, BC EST # D203/04).
38. In *Tri-West Tractor Ltd.*, BC EST # D268/96, a party did not provide to the Delegate information which was reasonably available and relevant to the investigation, and it later sought to introduce that information on appeal. The Tribunal wrote as follows:

This Tribunal will not allow Appellants to “sit in the weeds”, failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

39. In order to succeed in an appeal on the basis that new evidence has become available, the Appellant must not only show that the new information was not considered by the Delegate. The new information the party seeks to submit must have been unavailable at the time of the investigation. The appeal is not a second opportunity to bring forward the case which should have been presented to the Delegate.
40. All of the information presented in support of the appeal was available to Pro Gas and Heating at the time of the investigation. The appeal is an attempt to present the case which should have been made to the Delegate at the investigation stage.

41. The Tribunal will not consider new evidence in the context of an appeal which could have been provided at the investigation stage (see also *Kaiser Stables Ltd.*, BC EST # D058/97). The Appellant has not identified any evidence as “not available” at the time the Determination was being made, and its appeal based on the allegation of new evidence must therefore be dismissed.

3. Did the Delegate err in law in making the Determination?

42. After providing the Appellant with the opportunity to respond to the complaint, the Delegate issued the Determination based on the evidence before him. A review all of the documentation presented for this appeal, including the record, the Determination, and all of the submissions of the parties, does not reveal any error in law by the Delegate.

CONCLUSIONS

43. For all of the above reasons, I do not find that the Director failed to observe the principles of natural justice, or that there was any error in law in making the Determination. The evidence which the Appellant now seeks to submit on appeal could have been provided to the Delegate during the investigation had Pro Gas and Heating chosen to participate in the investigation. The appeal is dismissed.

ORDER

44. Pursuant to Section 115 of the *Act*, I order that the Determination, dated April 15, 2010, be confirmed, together with any interest that has accrued under section 88 of the *Act*.

Carol-Ann Hart
Member
Employment Standards Tribunal