

An appeal

- by -

Greg Finn and Paul Kelman operating as Finn Kel Coatings
(“Greg Finn”)

- 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: Sheldon Seigel

FILE No.: 2006A/92

DATE OF DECISION: September 25, 2006

DECISION

SUBMISSIONS

Greg Finn	on behalf of Greg Finn and Paul Kelman operating as Finn Kel Coatings
Shawn Furber	on his own behalf
M. Elaine Phillips	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Greg Finn of a Determination that was issued on June 16, 2006 by a delegate of the Director of Employment Standards. The Determination found that Greg Finn and Paul Kelman operating as Finn Kel Coatings had contravened sections 18, 27, and 58, of the *Act*, and section 46 of the *Employment Standard Regulation* (the “*Regulation*”) in respect of the employment of Shawn Furber, and ordered Greg Finn and Paul Kelman to pay Shawn Furber the amount of \$2,043.76. This amount included wages, vacation pay and accrued interest.
2. The Director also imposed administrative penalties on Greg Finn and Paul Kelman under Section 29(1) of the *Regulation* in the amount of \$1,500.00.
3. Greg Finn submitted that the Director failed to observe principles of natural justice by:
 - (a) failing to afford him a reasonable opportunity to respond to the allegations made against him by Shawn Furber;
 - (b) failing to afford him a reasonable opportunity to pay Shawn Furber the amount owing to Mr. Furber; and
 - (c) failing to recognize that he did not have control over the documents (specifically wage records) that he was required to produce.
4. Greg Finn says there is evidence which has become available which was not available at the time the Determination was made. That evidence has been provided by way of submissions in the appeal.
5. An oral hearing was requested. The Tribunal reviewed the appeal and the materials submitted with it and decided an oral hearing was not necessary in order to decide this appeal.

ISSUES

6. The issues in this appeal are:
7. Did the Director fail to observe the principles of natural justice in making the Determination?

8. Has new evidence become available that was not available at the time the Determination was made, and if so, what impact does that new evidence have on the results of the Determination?

ARGUMENT

Natural Justice

9. The Appellant submitted that the delegate and he spoke on the telephone on several occasions and that he offered to pay Mr. Furber's outstanding wages. At one point, the delegate advised him that Mr. Furber could not be located and that the delegate was therefore dropping the case. Thereafter, he was available at all times and heard nothing more from the delegate until he was advised that he was in violation of the *Act*. He disputed the allegations that he was unavailable and the delegate could not locate evidence of a registered company with contact information. He confirmed that in two telephone conversations he insisted that he was prepared to pay outstanding wages to Mr. Furber.
10. The Appellant also submitted that the little contact between he and the delegate did not provide him adequate opportunity to respond to the allegations made against him. He said that he was readily available at all times and that he would have been happy to discuss payment of Mr. Furber's wages with the delegate, had she desired to do so. After he left the company, he had no further contact with his former partner Mr. Kelman and had no knowledge of further communications between the delegate and Mr. Kelman.
11. Finally, the Appellant submitted that he did not have control over payroll records in the possession of his partner and therefore did not have the materials with which to dispute Mr. Furber's claims.
12. The delegate submitted that Mr. Finn knew about the complaint and had adequate opportunity to respond. He was either unable or unwilling to provide any relevant information during the investigation of the complaint.
13. In particular the delegate submitted that on several occasions she spoke with Mr. Finn and advised as to the nature and details of the claim. Mr. Finn suggested that he would pay half of the amount that Mr. Furber was owed, but he did not know what that amount was as he had no control over the employment records. He offered to find out and call the delegate back, but no further contact was forthcoming.
14. The delegate unsuccessfully attempted to contact Mr. Finn on several occasions thereafter. She made telephone calls, searched for additional contact information at the Company Registry (which information was unavailable) and sent correspondence by regular and registered mail. All mail was returned but for the Determination, which surprisingly, reached Mr. Finn. Mr. Finn then sent material to the delegate and contacted her by telephone. He was then advised as to how to appeal the determination.

New Evidence

15. The Appellant submitted that as a result of the failure of the Director to communicate with him, he was unable to provide details of his position before the Determination was made. Those details were provided in the appeal and speak to the following:
- The circumstances of missed calls and lack of communication.

- He was unaware that wages owing could be paid to the Director after a compliant had been filed (he tried but could not find Mr. Furber),
- Finn Kel coatings was a partnership rather than a corporation and therefore would not be found in the Company Registry,
- All of the company records were kept at the accountants office or the home of Mr. Kelman and he did not know he had an obligation to have access to those records,
- His instructions to the accountant was that vacation pay was to be added to each wage cheque and he did not know that it was not done,
- His daytimer has records of the hours worked by Mr. Furber,
- Mr. Furber disappeared from work without notice and could not be located.

16. Mr. Finn further submitted that although wages are owing to Mr. Furber, the vacation pay is not payable and some of the interest assessed by the Determination should not be payable as he was willing to pay months ago.

17. The delegate of the Director submitted:

18. Mr. Finn never mentioned in conversation that Mr. Furber had disappeared from work without notice, and provided no evidence that Mr. Finn or Mr. Kelman ever tried to locate Mr. Furber to pay him, or to pay the wages to the Director pursuant to the *Act*.

19. Mr. Finn has never made any payment to the Director, notwithstanding that he repeatedly agreed that wages were owing.

20. Mr. Finn asserted that he was confident that he owed less than the amount Mr. Furber was claiming, but has never indicated that he has any payroll records from which he could have ascertained that information.

21. Mr. Furber submitted:

22. He spoke to Mr. Finn prior just prior to filing the complaint with the Employment Standards Branch. Mr. Finn told him that he could pick up his outstanding wages at the company office. He attended but was turned away without payment. He phoned Mr. Finn again a week later and again was told the money was not available.

23. After making the complaint to the Employment Standards Branch, he called Mr. Kelman and was told that he would not be getting his cheque, because he had made a complaint.

24. Other employees also got pay stubs without reference to vacation pay. He provided the name of one such employee who did not receive vacation pay, a Record of Employment, or a T4.

THE FACTS AND ANALYSIS

Natural Justice

25. I find that the Appellant was provided with a reasonable opportunity to respond to the allegations made against him. I find that the delegate made contact with Mr. Finn on numerous occasions and clearly identified the claims against him. I find that thereafter the delegate tried in all reasonable fashion to continue to have dialogue with Mr. Finn about the claim, but Mr. Finn was not to be found. I find also that Mr. Finn knew how to get in touch with the delegate and had reason to believe that she was awaiting information from him. Mr. Finn did not make timely contact with the delegate and did not provide the delegate with information that he was required to produce to support his defence of this claim.
26. Mr. Finn claimed that he did not have access to employee records as they were being held by his partner. This does not exonerate Mr. Finn from responsibility to obtain these records. Section 28(1) of the *Act* requires that an employer must keep records of employee information. As a partner, Mr. Finn was responsible for access to those records. Further, I find that Mr. Finn failed to show that he made reasonable or any efforts to secure those records from his partner. Therefore Mr. Finn's claim that the Director erred in failing to recognize that the records were not available to him, must fail.

New Evidence

27. Much of the evidence that Mr. Finn claimed was new, was not relevant to the Determination. In particular, I find his view of the circumstances surrounding the missed calls and miscommunication between he and the delegate, his proclaimed ignorance of the ability to pay wages to the Director, his ignorance of his obligation to have employee records, and his accountant's failure to include vacation pay on employee paycheques, to be irrelevant.
28. Mr. Finn indicated that he could not locate Mr. Furber following Mr. Furber's absence without notice from work, and that this was new evidence. I find this not credible. I accept the evidence of the delegate that Mr. Finn did not ever mention this to her in two telephone conversations about the history of Mr. Furber's employment. I find it impossible to accept that Mr. Furber accidentally omitted this information which would be critical to his position.
29. Section 19(1.0) of the *Act* provides: *if an employer cannot locate an employee to pay the employee's wages, the employer must pay the wages to the director within 60 days after the wages became payable.* The facts clearly indicate that this was not done. Either Mr. Furber did not disappear as Mr. Finn submitted, or Mr. Finn failed to appreciate his obligations under the *Act*. In either case, Mr. Finn's position must fail.
30. Mr. Finn provided day-timer entries to dispute the hours that Mr. Furber worked. I find this evidence unconvincing. Mr. Finn had the opportunity to present this prior to the Determination and failed to do so. In Mr. Finn's submissions he indicated that as no employment records were in his possession, he could not dispute Mr. Furber's claimed hours. This speaks to Mr. Finn's own view of the unreliability of the day-timer entries. Further, those entries if made contemporarily with the events described therein would have been available to Mr. Finn prior to the Determination and therefore would not qualify as new evidence.

31. Mr Finn disputed the applicability of the fines levied by the Determination. I find those fines are in accordance with the *Regulation*. Once a contravention of the *Act* has been found, the Director has no discretion with respect to the assessment of administrative penalties.
32. Mr. Finn also disputed the interest awarded in the Determination. He claimed that as he was prepared to pay “months ago” he should not be responsible for interest from that date. Mr. Finn may have indicated that he was prepared to pay, but there is no evidence that supports that he made any effort to pay, and the fact that he did not pay is uncontested. This argument must fail.
33. The Appeal fails on all grounds.

ORDER

34. Pursuant to section 115 of the *Act*, I confirm the Determination.

Sheldon Seigel
Member
Employment Standards Tribunal