

An appeal

- by -

Whorley Plumbing & Heating Ltd.
("Whorley")

- 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: Ian Lawson

FILE No.: 2004A/50

DATE OF DECISION: June 8, 2004

DECISION

SUBMISSIONS

Donald Lynn Whorley	On behalf of Whorley Plumbing & Heating Ltd.
Ken Elchuk	On behalf of the Director of Employment Standards
Derek Davies	On his own behalf

OVERVIEW

This is an appeal by Whorley Plumbing & Heating Ltd. ("Whorley") pursuant to section 112 of the *Employment Standards Act* ("Act"). The appeal is from Determination ER#122-013 issued by Ken Elchuk, a delegate of the Director of Employment Standards, on February 20, 2004. The Determination found Whorley liable to pay regular wages and interest to Derek Davies in the amount of \$451.70, together with an administrative penalty of \$500.00. Whorley filed an appeal on March 29, 2004. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Whorley is a plumbing contractor in Surrey, and was found by the delegate to have employed Derek Davies ("Davies") as a plumber between April 23, 2003 and April 28, 2003. Davies filed a complaint that Whorley had failed to pay him regular wages, overtime pay and vacation pay. The delegate elected to conduct an adjudication hearing in relation to this complaint, which was held on February 12, 2004. Davies appeared at the hearing, but Whorley did not.

The delegate sets out the following in the Determination:

On November 5, 6 and 7, 2003 an employee of the Branch attempted without success to contact the employer to discuss the complaint filed by the complainant. On each occasion the message on the employer's telephone stated "mobile customer unavailable". On November 19, 2003 a Notice of Mediation Session was sent to the employer by registered mail. The Canada Post tracking record showed that the Notice was successfully delivered to the employer on November 20, 2003. The employer did not attend the mediation session on December 3, 2003 as had been set out in the Notice of Medication Session. The next day the Mediation Officer contacted Whorley who advised the Officer that payroll records would be submitted. It is noted that the Branch received the Exhibit 2 records from the employer on December 8, 2003.

On January 19, 2004 a Notice of Complaint Hearing was sent to the employer by registered mail. The Canada Post tracking record indicates that on February 4, 2004 the registered mail was received at the appropriate retail outlet but was "returned, unclaimed". The unclaimed mail was then returned to the Branch and was received on February 9, 2004.

On February 4, 2004, a Branch employee contacted Whorley by telephone in order to determine if the employer intended to attend this hearing. Whorley confirmed that he had not picked up the registered mail containing the Notice of Complaint Hearing. The Branch employee then verbally

advised Whorley of the hearing date. On February 5, 2004 a copy of the Notice of Complaint Hearing was sent to the employer by regular mail. The employer did not provide his fax number.

The employer was not present at the hearing at 9:00 a.m., the time set out on the Notice of Complaint Hearing. The date and start time for the hearing had been sent to the employer by registered mail, regular mail, and had been communicated to Whorley on February 4, 2004 by the Branch employee. At 9:15 a.m. a Branch Delegate contacted Whorley by telephone. Whorley advised that he did not know the hearing was scheduled for February 12, 2004. He further advised that he would not attend the hearing even if he was given additional time to attend.

The delegate then proceeded with the hearing and heard evidence from Davies. The delegate found that Davies was an experienced plumber who responded to an advertisement on the Internet which sought an experienced plumber to do residential work. Davies subsequently spoke with Donald Whorley and agreed to go to a job site the next day. He agreed that if he was hired, he would be employed by Whorley at a rate of \$12.00 per hour. Davies attended the job site and apparently commenced working. Donald Whorley attended the site later in the morning, and after inspecting Davies's work, hired him. Davies worked at two different sites until April 28, 2003, when he advised Whorley he quit his employment.

The delegate found Davies had recorded his hours of work on a pocket calendar, and that Davies had faxed his record of hours worked to Whorley with a request for payment. Not receiving payment in the ensuing two weeks, Davies sent a second statement to Whorley. After no payment was received, Davies spoke with Whorley and then attended his home to ask for payment, unsuccessfully. Davies then delivered the Employment Standards Branch self-help kit to Whorley, which was not responded to. Davies then filed his complaint with the Director. One of the documents filed by Davies at the hearing was a photocopy of a cheque dated May 2, 2003 payable to Davies in the amount of \$399.35. The cheque was drawn on the account of "Whorley Plumbing & Heating Ltd." but the original was apparently never received by Davies.

The delegate observed at length in the Determination that section 77 of the *Act* requires the Director to make reasonable efforts to give a person under investigation an opportunity to respond, and a failure to do so would amount to a breach of the principles of natural justice. The delegate referred to the fairness and efficiency principles set out in section 2 of the *Act*, and concluded that Whorley was properly served with the Notice of Complaint Hearing and was fully aware of the time and place of the hearing. The Determination was then issued.

Whorley's Appeal Form states that the Director erred in law, and includes the following statement:

Derek Davis never worked for Whorley Plumbing & Heating Ltd. not 1 minute. He worked for Whorley Mechanical Ltd., two separate companies with totally different owners. On top of that he took my tools.

Donald Whorley then delivered a letter to the Tribunal dated April 29, 2004, in which he says:

Mr. Davies was hired by Whorley Mechanical Ltd. And is verified by the attached witnessed statement as sworn out by former employee Devin Reid. Mr. Reid was also witness to the removal of tools from the job site. These tools have never been returned.

The same letter contains a handwritten portion signed by Donald Whorley, stating:

I would ad [sic] that at the time Derek Davies was offered by Whorley Plumbing & Heating Ltd. that if he returned the tools he would be able to be paid from Whorley Plumbing & Heating Ltd. just to get my tools back although he worked for Whorley Mechanical owned by Jim Morgan who was also my employer. This offer would still be available.

Attached to the letter is a statement signed by Devin Reid, attesting to the fact Davies worked with Reid for “Whorley Mechanical Ltd.”

ISSUE

Does the Determination contain any error of law?

ANALYSIS

An appellant before this Tribunal will not normally be able to tender evidence at the appeal if that evidence had not been presented to the delegate (see *Tri-West Tractor Ltd.* BC EST #D268/96, and *Kaiser Stables Ltd.* BC EST #D058/97). In the absence of some extraordinary reason for failing to present the evidence to the delegate, an appellant may not “lie in the weeds” and present important evidence only after a Determination has been issued against their interest.

As the delegate noted in the Determination, Whorley gave no indication to anyone (including Davies himself) that the party which should have been the subject of Davies’s complaint was Whorley Mechanical Ltd. Indeed, Whorley delivered employee records to the delegate without saying anything about the allegation it was not a proper party to the matter. Donald Whorley had telephone contact with at least two employees of the Director, and again made no mention of the issue he now seeks to raise on behalf of Whorley Plumbing & Heating Ltd. No explanation is made for writing a cheque payable to Davies (presumably in the amount of the wages he claimed to be owed), on an account belonging to “Whorley Plumbing & Heating Ltd.” Having been given fair notice of the complaint hearing, and having elected not to attend (Donald Whorley having advised he had no intention of attending the hearing even if it was to be re-scheduled), and having advanced no extraordinary reason why the evidence it now seeks to tender could not have been tendered at the complaint hearing, I find Whorley to be an appellant that has chosen to lie in the weeds, at its peril. I therefore decline to admit into evidence the information and statement which Whorley has supplied in support of its appeal.

The word “employer” is defined in the *Act* as follows:

“employer” includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

By this definition, the delegate would have been perfectly correct in treating Donald Whorley personally as Davies’s employer, given Donald Whorley’s negotiation with Davies as to the terms of his employment, his decision to hire Davies, and his direction as to where Davies was to work. The delegate elected to pursue the corporate entity, and as I have found, Whorley has failed to persuade me the Determination contains any error of law in that regard. The appeal must therefore be dismissed.

ORDER

Pursuant to section 115(1) of the Act, the appeal is dismissed and Determination ER#122-013 issued on February 20, 2004 is confirmed.

Ian Lawson
Member
Employment Standards Tribunal