

An appeal

- by -

Patrick Bubish AKA Patrick Bubuch operating as
APK Awnings and Maintenance
(the “employer”)

- 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: Paul E. Love

FILE No.: 2000/811

DATE OF DECISION: March 5, 2001

DECISION

OVERVIEW

This is an appeal by the employer of a Determination dated November 16, 2000 by the employer Patrick Bubish, also known as Patrick Bubuch operating as APK Awnings and Maintenance (“Bubish” or “employer”). The employer did not clearly identify errors made by the Delegate in determining that wages were due and owing to three employees. The employer failed to comply with three demands made by the Delegate for records, and the Delegate therefore relied on records made by the employees in determining the employees’ entitlements to wages. The Delegate also preferred the evidence of the employees with regard to wage rates, where the employees evidence differed from that of the employer. The employer did not raise any errors with regard to the Determination, and I am not prepared to disturb the Determination which is based on findings with regard to credibility and where the employer failed to produce documents demanded by the Delegate. I dismissed this appeal as a frivolous appeal pursuant to s. 114 of the *Employment Standards Act* (the “Act”).

ISSUE:

Did the Delegate err in preferring the evidence of the employees over the employer’s evidence relating to hours of work, and rates of pay?

FACTS:

I decided this matter upon written submissions, without an oral hearing. Patrick Bubish, also known as Patrick Bubuch operating as APK Awnings and Maintenance (“Bubish” or “employer”) carries on business manufacturing and maintaining awnings and signs. After an investigation, the Delegate found that three employees, Carl Marinschek, Craig Mason, and Peter Novak were not paid wages, minimum daily pay, overtime pay, and vacation pay owing to them in violation of sections 17(1), 18(1), 18(2), 34(2) 40(1), and 58(3) of the *Act*. The Delegate determined that Carl Marinschek was entitled to a total of \$972.16, Craig Mason was entitled to the sum of \$792.57, and Peter Novak was entitled to \$403.79. For the purposes of this appeal it is unnecessary to identify the breakdown of the amounts as between overtime, wages, minimum daily pay and vacation pay.

The Delegate made efforts to afford to the employer a reasonable opportunity to participate in the investigation of the complaints. The Delegate wrote to the employer on April 5, 2000 advising of the complaints and requesting information from the employer. On June 7, 2000, the Delegate phoned the employer, following up on the request for information. On September 13, 2000, the Delegate issued a Demand for Employer records. On October 10, 2000 the Director issued a penalty determination to the employer for non-compliance with the Demand for records. On October 10, 2000 the Delegate issued a letter to the employer advising of the process and

issued a second demand for employer records. On October 13, 2000 the Delegate requested original documents and records concerning the employees. On November 1, 2000, the Delegate telephoned the employer to discuss the non-production of records and reconfirmed the need to provide original documents. The Delegate issued a letter and a third demand for employer records on November 1, 2000.

The only records supplied by the employer was a spreadsheet for each of the employees which indicated the daily hours of work, the amounts paid and the wage rates.

The Delegate determined the facts in respect of each employee by reviewing records that each employee kept of the dates worked and hours worked. The Delegate drew an adverse inference against the employer for failing to provide documents, and for failing to advance any reason for the failure to provide documents. The Delegate found that the records made by the employees were made contemporaneously with the events, and therefore were reliable. Where the evidence of the employer and the employee differed with regard to the hourly rate of pay, as it did for Mason and Novak, the Delegate relied upon the evidence of the employees. Where the evidence of the parties conflicted with regard to hours of work, and payments made, the Delegate preferred the evidence of the employees.

THE EMPLOYER'S SUBMISSION:

The employer's submission with regard to this case remains mysterious. With regard to Mr. Marinschek, in addition to the notice of appeal and a spreadsheet, there is a half page commentary which deals with facts related to scheduling and a suggestion that Mr. Marinschek had received \$1,252.00 and cash of \$275.00. The appeal submission does not identify any error with regard to the Determination.

The form of the appeal with regard to Mr. Mason, attaches a spreadsheet, and also, on Mr. Mason's spreadsheet, there is a cryptic calculation, which amounts to a suggestion that Mr. Mason is entitled to be paid \$126.00 based on an hourly rate of \$8.00 per hour for 85 hours less amounts paid. The appeal does not identify any error with regard to the Determination as it concerns Mr. Mason's entitlement. There is no written appeal submission which identifies any error with regard to the Determination.

With respect to Mr. Novak, the appeal consists of the notice of appeal, to which the appellant has attached a spreadsheet. The appellant has not provided any written submission which identifies any error in the Determination as it concerns Mr. Novak's entitlement.

The employer provides information on this appeal, which is different from that which was supplied to the Delegate. This information was not supplied to the Delegate, and therefore I decline to consider this information in assessing whether the Delegate erred.

ANALYSIS:

In an appeal under the *Act*, the appellant, in this case the employer, must show that there is an error in the Determination such that I should vary or cancel the Determination. The employer failed to participate in the investigation of the Delegate although he was given ample opportunity to do so. His appeal submission is so deficient that I cannot determine whether he has raised any error in the Determination. He seeks an oral hearing so that he can revisit the investigation process. The Tribunal's process makes it clear to the parties that the matter may be decided upon written submissions, and therefore a written submission should be attached to the appeal.

This Tribunal has indicated in the past that it will not permit an employer to lie in the weeds, and produce to the Tribunal information which should have been produced to the Delegate: *Tri-west Tractor Ltd.*, *BCEST #D268/96*. The Tribunal's function is to correct errors that the Delegate may have made during the earlier investigative process.

I am not prepared to revisit the Delegate's fact finding process, in this case, where that process turned on credibility of the parties, and the failure of the employer to produce records required to be kept by the *Act*. If the employer had a story to tell which differed from that put forward by the complaint he certainly had an opportunity to do so, and the time is now passed for further investigation. This appeal is entirely devoid of content and merit, such that it can be characterized as a frivolous and vexatious appeal, and dismissed pursuant to s. 114 of the *Act*.

ORDER

Pursuant to Section 114 of the *Act*, the appeal of the Determination of November 16, 2000 is dismissed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal