

An appeal

- by -

Ram Narayan Khas
("Khas")

- 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/66, 2004A/67 & 2004A/68

DATE OF DECISION: July 5, 2004

DECISION

SUBMISSIONS

Cal Mitten

On behalf of the Director

OVERVIEW

On April 16, 2004, Ram Narayan Khas ("Khas") filed three appeals pursuant to section 112 of the *Act*. They are from three Determinations all bearing ER#077492 issued by Cal Mitten, a delegate of the Director of Employment Standards, on March 12, 2004. Twenty-one former employees of Young Reforestation Services Ltd., including Khas, had complained to the Director that they were owed wages, holiday pay and vacation pay. The Determinations found Young Reforestation Services Ltd. liable to pay wages, holiday pay and vacation pay to each complainant in the total amount of \$31,890.63, and found two directors/officers of that company liable for up to two months of the same wages. The appeals are now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Young Reforestation Ltd. operated a silviculture contracting business, and employed the twenty-one complainants as tree planters and brushers during the 2003 season at various rates of pay. The delegate found the company became disabled as a result of a dispute between its directors and the company is not expected to continue to operate. The delegate reports that one of the directors, Kuldip Bhangal, does not deny wages are owed but says the company is unable to pay and company payroll records could not be produced as a result of a dispute with the other director, Harjinder Bhangal. The latter director then produced payroll records to the delegate, who was able to determine the amount of wages owing to all but two of the twenty-one employees.

Most of the employees had received some of the wages which the records showed were owing to them, and the delegate was required to deduct those partial payments from the total wages shown owing in the records. From the payroll records, the delegate determined that Khas was owed wages, holiday pay and vacation pay in the total amount of \$11,751.94. He also determined that \$8,000.00 had been paid to Khas already, leaving \$3,751.94 owing plus interest.

Khas, however, claims that he was only paid \$7,000.00 by the employer, and not \$8,000.00 as found by the delegate. His ground of appeal is that evidence has become available that was not available at the time the Determination was being made. That evidence is in the form of three cancelled cheques payable to him by Young Reforestation Ltd., in the following amounts: \$1,000.00 dated June 3, 2003; \$500.00 dated August 4, 2003; and \$5,500.00 dated September 9, 2003. The remedy sought by Khas is expressed as follows:

"I would like the Director to investigate more on the wages for Mr. Ram Khas, and to look over the cheques that we have sent with this Appeal. And would like to change the Information on this Determination."

Young Reforestation Ltd. has not filed any submissions or evidence on the appeal. The delegate filed a submission, which I reproduce in its entirety:

Herewith my response to the appeal submitted by Ram Narayan Khas.

The Employer submitted two cheques (see attached), which they claimed had been paid to this Complainant. The first cheque, dated June 3, 2003, has been acknowledged as received. The Complainant denies receiving the second cheque dated September 9, 2003, and supplies very convincing evidence that he only received \$7,000.00 in total.

I would suggest that the only way the Employer can attempt to refute the Complainant's evidence is by supplying either myself or the Tribunal with a copy of the stamped confirmation from the September 9, 2003 \$7,000.00 cheque.

Thank you for your consideration of this submission.

Attached to this submission are copies of a cheque dated June 3, 2003 and payable to Khas in the amount of \$1,000.00 (which appears to be an exact copy of the first of the three cancelled cheques submitted by Khas), and a cheque dated September 9, 2003 and payable to Khas in the amount of \$7,000.00.

ISSUE

Should the Determinations be varied as a result of evidence becoming available that was not available at the time the Determination was being made?

ANALYSIS

It appears from the delegate's submission that he relied exclusively on the employer's payroll records to determine the amount of wages that had already been paid to Khas. It also appears that no direct communication may have occurred between the delegate and Khas prior to the determination being issued. I infer that Khas was not aware of the amount of wages the delegate believed had already been paid to him, until he received the Determination. At that point, I infer Khas produced copies of the cancelled cheques, apparently indicating that a total of \$7,000.00 had been paid, instead of \$8,000.00.

Neither Young Reforestation Ltd. nor the two directors/officers have filed any evidence or submissions on these appeals. In his submission, the delegate describes Khas's new evidence as "very convincing" and notes the employer has not refuted it by supplying proof the \$7,000.00 cheque had been cashed. It is of interest, however, how Khas came into possession of the cancelled cheques, which should have been in the employer's possession in the first place.

In any event, I find the cancelled cheques produced by Khas were not available to the delegate at the time the Determination was being made. The reason they were not so available is unclear, but it does seem clear that the delegate would have arrived at a different result for Khas had he seen the cancelled cheques before making the Determination. I find no fault lies with Khas for this problem, as I infer he had no idea about the amount of money the delegate found had been paid until the Determination was received.

Section 2 of the *Act* identifies one of the purposes of the *Act* as follows:

- (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.

Section 86 of the *Act* reads as follows:

- 86 (1) Subject to subsection (2), the director may vary or cancel a determination.
- (2) If a person appeals a determination that the director intends to vary or cancel under subsection (1), the director must vary or cancel the determination within 30 days of the date that a copy of the appeal request was received by the director.

It is regrettable the delegate declined to vary his determination after receiving the cancelled cheques produced by Khas. Although Khas only seeks as a remedy that the delegate further investigate the issue, I find it would be contrary to the fairness and efficiency principle for me to refer the matter back to the director as requested. Khas has produced clear and compelling evidence in these appeals that he was only paid \$7,000.00 instead of the \$8,000.00 alleged by the employer. The employer, and its directors/officers, have failed to respond to the appeal in any way, and in any event, it is difficult to imagine what evidence could be presented that would call into question the validity of the cancelled cheques. In this circumstance, I find the three cancelled cheques Khas has produced should be admitted at these appeals as new evidence, and in the absence of any evidence or argument to the contrary, Khas's appeals should be allowed.

ORDER

Pursuant to section 115(1) of the *Act*, the appeals are allowed the three Determinations bearing ER#077492 issued on March 12, 2004 are varied to provide that Khas is owed wages, holiday pay and vacation pay in the total amount of \$4,751.94, together with interest on that amount pursuant to section 88 from the date Khas's employment terminated or the date Khas's original complaint was delivered to the director, whichever is earlier.

Ian Lawson
Member
Employment Standards Tribunal