

An appeal

- by -

Darwin Gallagher operating as Mid Mountain Contracting
("Mid Mountain")

- 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: Carol L. Roberts

FILE No.: 2003A/58

DATE OF DECISION: April 15, 2003

DECISION

This decision is based on written submissions by Darwin Gallagher, operating as Mid Mountain Contracting, and Graham Jickling on behalf of the Director of Employment Standards.

OVERVIEW

This is an appeal by Darwin Gallagher operating as Mid Mountain Contracting (“Mid Mountain”) of a Determination of a delegate of the Director of Employment Standards issued January 20, 2003. The delegate concluded that Mid Mountain contravened sections 18(1), 40(1) and (2) and 58(3) of the Act, in failing to pay David Still and Joe Doran wages, overtime and annual vacation pay. The Director ordered that Mid Mountain pay Mr. Still and Mr. Doran \$1,862.86 and \$1,324.88 respectively, in outstanding wages and interest. The delegate also assessed a \$500.00 penalty against Mid Mountain for its failure to produce payroll records.

Mid Mountain alleges that the delegate failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.

ISSUES TO BE DECIDED

Whether the delegate failed to observe the principles of natural justice, and whether Mid Mountain has established that there is new and relevant evidence that was not available at the time the delegate made the Determination.

FACTS

Mr. Doran and Mr. Still filed complaints against Mid Mountain alleging they had not been paid wages and vacation pay. On December 12, 2002, the delegate conducted a hearing into the complaints which Mr. Gallagher attended by conference call. The delegate noted that, approximately ½ hour into the hearing, Mr. Gallagher complained that he had not received the “notice of complaint hearing”, that he had other business commitments, and elected not to continue with the hearing. The delegate later confirmed that, although the notice of hearing had been sent to Mr. Gallagher, it had been returned as “unclaimed”.

The delegate notes that, prior to the sending the notice of hearing, he had a discussion with Mr. Gallagher, explaining the process and time and date of the hearing.

Given the delegate’s difficulty in assessing the claims, and in light of the fact that Mr. Gallagher had sold his business and moved to Alberta, he provided Mr. Gallagher with a written summary of the submissions of the employees, which he says were made independently of each other, and provided him with copies of the documents they had given him during the hearing. The summary and exhibits were sent to Mr. Gallagher on December 14, allowing him an opportunity to respond to the allegations by written submissions. Mr. Gallagher provided his written response on December 31, 2002.

The delegate determined that Mr. Still and Mr. Doran were employed by Mid Mountain as labourers from August 11, 2001 and May 14, 2002 respectively. Travel time was paid at one half the regular rate of pay.

Mr. Still alleged that he was to be paid foreman's rates when Mr. Gallagher was not on site. Both Mr. Still and Mr. Doran claimed that they were told they would be getting a \$1.00 per hour increase in their pay in the spring of 2002.

Mr. Gallagher confirmed the rates of pay for Mr. Still and Mr. Doran. However, he claimed that the \$1.00 per hour increase only applied to new bids, and that the "Creston Valley" job was not a new bid.

In the absence of clear evidence regarding an increase in pay, the delegate relied on the rate as established by payroll records, which did not show the employees were entitled to a pay increase.

Both Mr. Still and Mr. Doran alleged that all the hours they worked at the "Creston Valley" job site had not been paid. Both employees claimed the same number of hours of work. They also alleged they were entitled to overtime, travel time, holiday pay and live out expenses.

Mr. Gallagher confirmed that the employees worked all the hours in question but for 3 days in April, alleging that, on those days, the employees did not work "due to delivery delay" and that they should only be paid 4 hours. The delegate preferred the evidence of the employees on this issue, since Mr. Gallagher was not present on the job site, and had no evidence to support his assertions.

Mr. Gallagher alleged that, with respect to the "Creston Valley" job, the employees were working under a voluntary agreement that, if they completed the jobs properly, and if Mid Mountain got paid for the job, the employees would be paid. Mr. Gallagher alleged that Mr. Still and Mr. Doran did not "live up to their end of this agreement".

The delegate concluded that the employees did not make such an agreement, and that, in any event, section 4 of the *Act* did not permit the parties to enter into any agreement to be paid on conditions.

Mr. Gallagher alleged that he gave each employee \$300 for the "Creston Valley" job. The cheques were provided to the delegate. One contained the notation "re partial MidWest". The Creston Valley job was performed for MidWest Construction Services Ltd. The delegate accepted that Mr. Still and Mr. Doran had each been paid that amount.

Mr. Gallagher asserted that neither employee was entitled to overtime for their work on the site. The delegate concluded that the overtime provisions of the *Act* applied to the employees' work.

The delegate found that, with respect to both employees, travel time in the amount of one half of their regular rate of pay, was paid. However, given that Mr. Doran's rate of pay was \$15.00 per hour and the minimum wage is \$8.00 per hour, the delegate found that Mr. Doran was entitled to an additional .50 per hour for his travel time.

The delegate found he was without jurisdiction to consider the claims for living expenses, as those were not covered under the *Act*.

Finally, the delegate found that Mr. Gallagher was less than cooperative in providing records necessary to resolve matters in dispute, and that the records that were produced were less than complete. Accordingly, the Director imposed a penalty of \$500 for his failure to produce records pursuant to s. 46 of the *Act* and s. 28 of the *Regulations*.

ARGUMENT

With respect to the first ground of appeal, Mr. Gallagher says that the hearing was set to start at 10:00 a.m., but he was not contacted until 10:15. At that time, he says, neither Mr. Still nor Mr. Doran were present. He claims that Mr. Still appeared approximately 10:20 a.m., and Mr. Doran at 10:45 a.m.. He says the delegate asked him to wait on the line until Mr. Mr. Doran appeared. Mr. Gallagher says that he understood the purpose of the meeting was to set a date for a hearing, and that he had made other business commitments. He claims that the delegate disbelieved him, and told him that if he could not cancel his prior commitments, he would go ahead with the hearing whether Mr. Gallagher was present or not. Mr. Gallagher claims that the delegate has taken a dislike to him and because of that, will not receive natural justice from him.

With respect to the second ground of appeal, Mr. Gallagher submits a letter from Mid West Construction that states that he charged MidWest for the employees living out, which he says supports his claim that the employees were only paid for 4 hours 3 days in April because they had no work to do.

Mr. Gallagher also claims that he should not be assessed a \$500 penalty because he “talked to the Arbitrator in November” and upon his request, provided him the cancelled cheques, payroll and time sheets for the “Crescent Valley” job.

The delegate says that all payroll records were requested verbally on October 1, 2002, as well as by subsequent mediation notice setting a meeting for October 24, 2002.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made

The burden is on Mid Mountain to demonstrate that there has been a breach of natural justice, or that new and relevant evidence that was not available at the time of the Determination has become available, and should be considered. I am unable to find that Mid Mountain has discharged that burden.

Principles of natural justice are essentially procedural rights that ensure that parties have a right to be heard by an independent decision maker. There is no dispute that, although Mr. Gallagher did not fully participate in the oral hearing, the evidence presented at that hearing was summarized and provided to him so that he could respond to it. Nothing in Mr. Gallagher’s submission suggests that he was not provided with the allegations he was to meet, or given an opportunity to respond to those allegations.

Mr. Gallagher asserts that the delegate “dislikes” him. However, mere assertions of bias or predisposition are insufficient to make out a claim that natural justice has been denied. Allegations of bias against decision makers are serious, and must not be made speculatively. They ought not be made unless they are supportable by evidence. The onus of demonstrating bias lies with the person who is alleging its

existence. Furthermore, a "real likelihood" or probability of bias must be demonstrated. Mere suspicion, or an impression of bias, is insufficient to establish a claim.

I find that the delegate was alive to the issue of fairness, and though Mr. Gallagher was not able to participate in the hearing, nevertheless summarized the evidence and provided it to him to respond. Mr. Gallagher did respond, and his responses were considered and analyzed by the delegate. There was little dispute over the facts, and the delegate applied the law to those facts. There is no bias demonstrated on the face of the decision, and Mr. Gallagher has provided no reasonable basis to conclude that the delegate was biased. I find no support for this ground of appeal.

Mr. Gallagher also claims that there is evidence available that was not available at the time the Determination was made. This evidence consists of a letter to Mid Mountain from Midwest Construction Services dated September 11, 2002.

Given that the hearing was held December 12, 2002, and that Mr. Gallagher's written response to the allegations was made December 31, 2002, the "new evidence" is neither new nor unavailable at the time the Determination was issued. In fact, the letter was before the delegate. Therefore, I also find no basis for this ground of appeal.

Finally, Mr. Gallagher suggests that he claims that the penalty assessment should be vacated since he faxed cancelled cheques, payroll, and time sheets to the delegate in November.

Section 85(1)(f) of the *Act* provides that for the purpose of ensuring compliance with the *Act* and the *Regulations*, the Director may (c) inspect any records that may be relevant to an investigation under this Part, and (f) require any person to produce or deliver to a place specified by the director, any records for inspection under paragraph (c).

Section 28 of the Act provides as follows:

- (1) For each employee, an employer must keep records of the following information:
 - (a) the employee's name, date of birth, occupation, telephone number and residential address;
 - (b) the date employment began;
 - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
 - (e) the benefits paid to the employee by the employer;
 - (f) the employee's gross and net wages for each pay period;
 - (g) each deduction made from the employee's wages and the reason for it;
 - (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
 - (i) the dates of the annual vacation taken by the employee, the amount paid by the employer and the days and amounts owing;
 - (j) how much money the employee has taken from the employee's time bank, how much remains, the amount paid and dates taken.

The records show that a delegate, in the capacity of mediator with the Branch, sought all relevant information from Mr. Gallagher in September. The records were requested again in October and November. Both requests noted that a failure to produce records would result in a \$500 penalty. When documents were finally received in late November, they did not comply with the *Act*. The delegate received two cancelled cheques, what appears to be an excerpt from a payroll book, and some handwritten notations regarding someone's hours of work on "Macresent Valley". The documents do not comply with the *Act*.

I find no basis to set aside the penalty assessment.

The appeal is denied.

ORDER

I Order, pursuant to Section of the Act, that the determination, dated January 20, 2003, be confirmed in the total amount of \$3,687.74, together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal