

An appeal

- by -

David A. Gillies carrying on business as Tru-Line Painting

- 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: Yuki Matsuno

FILE No.: 2009A/128

DATE OF DECISION: December 8, 2009

DECISION

SUBMISSIONS

David A. Gillies	on behalf of David A. Gillies carrying on business as Tru-Line Painting
Omer Tokhi	on his own behalf
Karry Kainth	on behalf of the Director of Employment Standards

OVERVIEW AND BACKGROUND

1. David A. Gillies, carrying on business as Tru-Line Painting (the “Employer”), appeals a determination of the Director of Employment Standards issued September 23, 2009 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “Act”). The Determination was issued by a delegate of the Director of Employment Standards (the “Director”) after an investigation of a complaint filed by Omer Tokhi under section 74 of the Act. Mr. Tokhi alleged in his complaint that the Employer failed to pay his wages.

The Determination

2. The Determination outlines the events that led to the Determination being made, which may be summarized as follows: after the complaint had been filed, a hearing of the complaint was scheduled to be conducted on January 6, 2009. Prior to the hearing, the Employer offered Mr. Tokhi \$1,200.00 to resolve the complaint. Mr. Tokhi accepted the offer, and the Employer delivered two post-dated cheques of \$600.00 each on December 3, 2009, to the Employment Standards Branch, which in turn delivered the cheques to Mr. Tokhi. One cheque cleared payment. On December 31, 2008, the delegate received a letter from Mr. Gillies saying he had cancelled the second cheque. When on the same day the Delegate spoke to Mr. Gillies about the cancelled cheque, Mr. Gillies said he was cancelling the cheque and not paying Mr. Tokhi because Mr. Tokhi wanted him to help mislead the Insurance Corporation of British Columbia by having him state that Mr. Tokhi was off work for some days in September due to injuries from an automobile accident. Mr. Gillies stated that in his view, Mr. Tokhi was admitting to not working those days, and should not receive payments for those days; therefore the agreed upon amount of \$1,200.00 should be reduced.
3. On January 26, 2009, Mr. Gillies said he would pay the outstanding \$600.00 to Mr. Tokhi and would send another cheque the next week. The delegate did not receive any cheque from Mr. Gillies. On April 24, 2009, the delegate sent the Employer a registered mail letter offering a final opportunity to resolve the matter if a payment of \$600.00 was made by May 8, 2009. The delegate advised the Employer that if it chose not to comply, an investigation would be initiated with the potential result of a Determination in which more than \$600.00 could be found owing to Mr. Tokhi. On May 7, 2009, the Employer provided the delegate with Mr. Tokhi’s T4. On May 19, 2009, Mr. Tokhi provided the delegate with a record of unpaid hours and dates, and three pay stubs, none of which showed Mr. Tokhi’s hourly rate, the number of hours he worked in the pay period, and vacation pay.
4. On September 4, 2009, the delegate sent the Employer a preliminary investigation findings letter by registered mail, advising that the investigation was leading the delegate to believe Mr. Tokhi is owed approximately \$1,967.08. In the letter the delegate asked the Employer to forward a cheque in that amount if the assessment was correct; alternatively, if the Employer disagreed, the delegate asked the Employer to dispute

the preliminary findings with written reasons and supporting evidence. The Employer was informed that if it chose not to respond, or if the reasons it gave did not result in a substantive change, the Branch would issue a Determination. The Employer was given until September 18, 2009, to respond to the letter.

5. On September 16, 2009, the delegate received a response regarding this matter. The letter was partly illegible and there was no legible indication of the identity of the author, but it indicated in that there was no money and to not write or phone the author again. The envelope the letter came in did not have a return address or name on it.
6. Having given the Employer numerous opportunities to provide evidence, the delegate proceeded to issue the Determination based on the evidence provided by Mr. Tokhi and the information contained in the file. The delegate found that the Employer had contravened the *Act* and that Mr. Tokhi was entitled to wages in the amount of \$2,035.04, including accrued interest under section 88 of the *Act*. As well, the Employer was assessed three administrative penalties of \$500.00 each under section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") for contraventions of sections 17 and 18 of the *Act* and section 46 of the *Regulation*. The total payable by the Employer under the Determination was \$3,535.04.
7. With respect to the issue of Mr. Tokhi's request for Mr. Gillies to write a letter to ICBC, the delegate says:

Upon speaking to Mr. Tokhi for clarification on this matter, Mr. Tokhi has essentially stated that he provided these dates to Mr. Gillies at random, and he actually did work on September 08, 09, and 10 – as his record of hours indicates, but contrary to what appears to have been said in his email to Mr. Gillies. I think that Mr. Tokhi wanted Mr. Gillies to assist him in his matter with the Insurance Corporation of British Columbia, regardless of whether this required Mr. Gillies to lie for Mr. Tokhi. However, this insurance matter is not one for me to decide because it is outside the jurisdiction of the Act and the [Regulation]. Prior to Mr. Tokhi sending this email to Mr. Gillies, Mr. Gillies did not specifically dispute the dates of September 08, 09 and 10; as a result, I find that Mr. Tokhi did work on September 08, 09 and 10, and is entitled to receive the wages he has claimed for those days.

8. Mr. Gillies appeals the Determination on the ground that the Director failed to observe the principles of natural justice in making the Determination.
9. I am able to decide this appeal on the basis of the written materials submitted before me, namely: the appeal form and submissions of the Employer; the submissions of Mr. Tokhi; the Director's submissions; and the Record forwarded by the Director under section 112(5).

ISSUE

10. Did the delegate, on behalf of the Director, fail to observe the principles of natural justice in making the Determination?

ARGUMENT AND ANALYSIS

11. It should be noted that the onus is on the Employer to establish the grounds of the appeal.

Principles of Natural Justice

12. The principles of natural justice refer to the basic procedural rights to which a party to a dispute is entitled, such as: the right to know the case against oneself; the right to have an opportunity to respond; the right to have the matter decided by an unbiased decision maker; and the right to be given reasons for the decision.

13. In his appeal submission, Mr. Gillies argues that he laid off Mr. Tokhi prior to August 29, 2008, and that he advised Mr. Tokhi that he was not going to continue with the particular job he had hired Mr. Tokhi to assist with. Mr. Gillies says he advised Mr. Tokhi to talk to another painting company on that same job to see if he could continue working with that company. Mr. Gillies says at no time did Mr. Tokhi provide him with any time sheets regarding the week of August 29, 2009. He also says that he received an email and phone call from Mr. Tokhi saying that Mr. Tokhi needed a letter from Mr. Gillies to give to ICBC as he was in a car accident and was trying to claim his wage loss for the week of August 29, 2008, to September 12, 2008. Mr. Gillies states that upon receiving this request from Mr. Tokhi he immediately cancelled the second cheque “as it was clear to me that Omar was not even working the week of August 29, 2008 and that he was not only trying to scam me but also trying to scam ICBC.” Mr. Gillies says he provided the delegate with Mr. Tokhi’s email and “did not see any reason why this should continue on any further.”
14. The delegate says in his submissions that all arguments presented by the Employer were considered, and found not relevant to the issues in dispute. He says that the Employer was given numerous opportunities to provide a full and detailed response during the investigation, and chose not to. The delegate says the Employer confirmed during the course of the investigation that Mr. Tokhi was owed wages. With respect to Mr. Gillies’ assertion that he was not Mr. Tokhi’s employer during that time, the delegate says that “in the initial stages of file assessment” Mr. Gillies told another delegate that he was not Mr. Tokhi’s employer during the time in question; however, Mr. Gillies did not inform the delegate during the investigation that the other company was Mr. Tokhi’s employer during the relevant time.
15. Mr. Tokhi’s submissions take issue with Mr. Gillies’ characterizations of the facts in his appeal.
16. Mr. Gillies’ arguments fail to support his appeal. Most of the information contained in his appeal takes issue with findings of fact that were made by the delegate in the Determination and appears to encourage the Tribunal to make different findings. However, an appeal to the Employment Standards Tribunal is not an opportunity to have the Tribunal re-hear the facts already put before the delegate with the potential of receiving a different result. In order to succeed, an appellant must prove the determination should be disturbed on very specific grounds, namely on the basis of error of law, failure to observe the principles of natural justice, or new evidence. In this case, Mr. Gillies had an opportunity to make the arguments he makes at this appeal to the delegate during the investigation. For instance, Mr. Gillies made the argument to the delegate that he should not have to pay Mr. Tokhi for particular dates in September because he considered Mr. Tokhi’s request for a letter for ICBC to be an admission that he did not work on those days. At the end of the investigation, the delegate came to particular conclusions that Mr. Gillies may disagree with, but which remain nevertheless conclusions that were properly drawn by the delegate after an investigation that fulfilled the requirements of natural justice. There is no evidence or indication that the delegate acted unfairly or deprived Mr. Gillies of his procedural rights in the investigation. As the delegate points out in the Determination, he made multiple attempts to solicit a response from Mr. Gillies and gave him numerous opportunities to bring forward evidence to support his position. The delegate provided the Employer with the details of the complaint, the requirements of the *Act*, opportunities to respond, and informed the Employer of the consequences of failing to participate in the process. I find that the Director did not fail to observe the principles of natural justice in making the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated September 23, 2009, be confirmed, along with any interest that has accrued pursuant to section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal