

An appeal

- by -

Daryl Berden
("Berden")

- 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: David B. Stevenson

FILE No.: 2004A/93

DATE OF DECISION: July 28, 2004

DECISION

SUBMISSIONS

Daryl Berden on his own behalf

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Daryl Berden (“Berden”) of a Determination that was issued on April 23, 2004 by a delegate of the Director of Employment Standards (the “Director”).

Berden had filed a complaint with the Director claiming he was owed wages by his former employer, International Indoor Soccer, Ltd. operating as Arena Sports (Arena Sports), for unpaid regular wages, annual vacation pay, length of service compensation and unpaid car mileage and cellular phone bills.

Following an investigation, the Director issued the Determination, which found Berden was owed regular wages in an amount of \$1971.43, annual vacation pay in an amount of \$270.00 and compensation for length of service in an amount of \$432.00. The Director concluded the claims for car mileage and cellular phone bills were not wages under the *Act* and were not recoverable.

Berden had claimed he had not been paid wages from March 15, 2003 to May 15, 2003 and was owed regular wages for that period. The Director found Berden had not met his burden to show he was owed wages for that entire period.

Berden says he has found a computer printout confirming he had worked in the period without being paid and had found gas receipts as proof of the costs he incurred to attend meetings.

The Tribunal has reviewed the appeal and the materials on file and has concluded that an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in this appeal is whether Becker has shown any error in the Determination that justifies the intervention of the Tribunal to vary it.

THE FACTS

Arena Sports operated an indoor soccer training facility in Langley, BC. Its assets were seized on, or about, May 15, 2003. Berden was employed by Arena Sports as an assistant manager from October 1, 2002 until May 15, 2003. Berden, and another employee, filed claims under the *Act* for wages owing. Among other claims, Berden claimed he was owed regular wages for the last two months of his employment – March 15, 2003 to May 15, 2003. the Determination notes that Berden was unable to produce any records to substantiate his claim. Arena Sports admitted Berden was owed “one bi-monthly pay cheque totalling \$900.00”.

On Berden's regular wage claim, the Director set out the following findings and analysis in the Determination:

The burden of proving that a total of 8 weeks regular wages are owed rests initially with the complainant Berden. I find that Berden has not satisfied this burden of proof. Berden supplied no payroll records, no wage statements, no cancelled cheques, no bank statements, no record of hours worked and no names of witnesses who could verify his claim that Arena Sports owes him 8 weeks wages from March 15, 2003 to May 15, 2003.

On the other hand, Arena Sports has not provided any payroll records for Berden even though Section 28(1) of the Act requires the employer to maintain specific payroll records pertaining to hours of work and wages paid to each employee. Arena Sports did not provide any of these payroll records, but did acknowledge that Berden is owed one bi-monthly pay cheque. Based upon this alone, I find that Berden is owed \$900.00 in unpaid regular wages.

On the claim for mileage and cellular phone bills, the Director concluded that as wages "refer to any money paid by an employer to an employee for services rendered or labour provided" and do not include amounts paid at the discretion of the employer, the "Director does not consider such amounts to be wages as defined in the *Act*" and were not recoverable under the *Act*.

The Determination notes that, at the request of Berden, the former General Manager of Arena Sports was contacted regarding the matter of regular wages owing. He agreed there were wages owing, but did not know what the amount of the claim might be.

ARGUMENT AND ANALYSIS

The burden is on Berden, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

- 112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) the director erred in law;*
 - (b) the director failed to observe the principles of natural justice in making the determination;*
 - (c) evidence has become available that was not available at the time the determination was made.*

This appeal challenges the Determination on the ground that evidence has become available that was not available at the time the Determination was made. The appeal form contains the following:

Found computer print out for proof of work for 8 weeks of no pay. Also found gas receipts for proof of travel for meetings which I was to get paid gas/mileage for and never did.

I will first address the reference to the gas/mileage claim. The Director does not have authority under the *Act* to require the payment of amounts owed by an employer to an employee that are not wages, as that term is defined in Section 1 of the *Act*. The Director concluded this was not claim for wages under the *Act*. Nothing in the appeal shows that conclusion was wrong. Even if Berden could have established the

amounts he says was owed to him for gas/mileage, he has not shown the amount was wages and that the Director had jurisdiction to issue a Determination on that amount.

Relating to the claim for regular wages, the appeal seems to suggest that Berden had found some additional or new evidence to support his claim for unpaid regular wages that was not available when the Determination was made, but no such evidence has been submitted with the appeal. As such, the Tribunal is unable to assess whether this “evidence” is evidence that was, in fact, not provided to the Director during the investigation, whether it could, or should, have been provided and whether it meets any of the criteria under which additional, or new, evidence will be considered by the Tribunal on appeal.

In the absence of such information and accompanying explanation, the Tribunal is only able to consider the merits of this appeal from the material already in the record. When that material is reviewed, this appeal cannot be seen as anything more than an effort on the part of Berden to have the Tribunal re-examine his claim and reach a different conclusion from the Director on the same information.

That is not a proper basis or ground for appeal and, accordingly, the appeal must be dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 23, 2004 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal