

An appeal

- by -

Eric Regan carrying on business as Diamond Whistler Painting Services
(“Mr. Regan”)

- 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: Shafik Bhalloo

FILE No.: 2014A/148

DATE OF DECISION: December 19, 2014

DECISION

SUBMISSIONS

Corey D. Steinberg

counsel for Eric Regan carrying on business as Diamond Whistler Painting Services

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Eric Regan carrying on business as Diamond Whistler Painting Services (“Mr. Regan”), has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 10, 2014 (the “Determination”).
2. The Determination found that Mr. Regan had contravened Part 3, section 18 (wages); Part 4, sections 34 (minimum daily hours) and 40 (overtime wages); Part 5, section 45 (statutory holiday pay); and Part 7, section 58 (vacation pay) of the *Act* in respect of the employment of Thomas W. Cole (“Mr. Cole”) and Paul J. Rattenbury (“Mr. Rattenbury”) (collectively, the “Complainants”). The Determination ordered Mr. Regan to pay the Complainants wages in the amount of \$6,300.04, including accrued interest pursuant to section 88 of the *Act*. The Determination also levied administrative penalties in the amount of \$1,500.00 against Mr. Regan. The total amount of the Determination is \$7,800.04.
3. Mr. Regan has filed an appeal of the Determination on the ground that the Director has failed to observe the principles of natural justice in making the Determination.
4. By way of a remedy, Mr. Regan is asking the Employment Standards Tribunal (the “Tribunal”) to refer the matter back to the Director with a view to having the matter “reheard with the Appellant’s participation”.
5. I note Mr. Regan’s Appeal Form was received by the Tribunal on November 3, 2014, after the time for appeal having expired on October 20, 2014. Counsel for Mr. Regan submits that the Appeal Form and attached materials were sent to the Employment Standards Branch (the “Branch”) on October 20, 2014, on the last day for filing the appeal, but not to the Tribunal. It was only on October 31, 2014, when counsel received a telephone call from the Branch confirming that the appeal materials were received, that counsel was alerted the appeal had not been filed with the Tribunal. Counsel then arranged to file the appeal with the Tribunal on November 3, 2014. In these circumstances, counsel seeks an extension of time to file the appeal.
6. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) provide that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
7. This decision is based on Mr. Regan’s written submissions in the appeal, the section 112(5) “record” that was before the delegate at the time the Determination was made and the Reasons for the Determination (the “Reasons”). If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Complainants and the delegate will be invited to file a reply to the question of whether to extend the deadline to file the appeal. Thereafter, Mr. Regan will be given an opportunity to make a final reply to these submissions, if any.

ISSUE

8. The issue at this stage of the appeal is whether there is any reasonable prospect the appeal will succeed.

THE FACTS

9. The facts set out below are drawn from the Reasons and the section 112(5) “record”.
10. Mr. Regan operates a painting business in and around Whistler, British Columbia, and both Complainants painted for him.
11. In the case of Mr. Rattenbury, he was terminated by Mr. Regan on November 7, 2013. In the case of Mr. Cole, he resigned on November 18, 2013. Both Complainants, very shortly thereafter, filed their complaints under section 74 of the *Act*, alleging that Mr. Regan contravened the *Act* by failing to pay them wages (collectively, the “Complaints”).
12. On June 13, 2014, a delegate of the Director sent Mr. Regan, by registered mail, a Notice of Complaint Hearing for both Mr. Rattenbury’s and Mr. Cole’s Complaints (the “Notices”). The delegate also issued a Demand for Employer Records (the “Demand”) at the same time. The Director’s record adduced in the appeal shows a Canada Post tracking document that indicates the package with the Notices and the Demand was successfully delivered on June 16, 2014, to Mr. Regan’s mail box address in Whistler.
13. Subsequently, on July 18, 2014, the delegate sent Mr. Regan a letter enclosing records provided by Mr. Rattenbury to the Branch for the hearing of his complaint. The letter also noted that the hearing was scheduled on Monday, August 11, 2014.
14. At 9:00 a.m. on August 11, 2014, the Complainants and a representative from the Branch (not the adjudicating officer) called in or joined the conference call, but Mr. Regan did not. At 9:05 a.m., the same Branch representative attempted to telephone Mr. Regan, but her call was unanswered. She then left a voice message for Mr. Regan advising that the Branch hearing scheduled for that morning was ready to commence. She also advised Mr. Regan in her message that the adjudicating officer would wait until 9:30 a.m. before commencing the hearing and left her office phone number. Mr. Regan failed to call in, and the hearing commenced at 9:30 a.m. without his participation.
15. At the hearing, the adjudicating officer heard the Complainants’ unopposed evidence. Before determining whether anything was owed in terms of wages to either of the Complainants, the delegate considered the issue of whether the Complainants were employees of Mr. Regan or independent contractors. In this regard, the delegate considered the definitions of “employee” and “employer” as set out in the *Act*, as well as the common law tests employed to assist in analysing whether a relationship is an employment relationship or not. Based on the evidence of the Complainants, the delegate concluded that both were employees of Mr. Regan, and then went on to determine the amounts each was owed by Mr. Regan.
16. After the hearing concluded, Mr. Regan left a message for the delegate who had attempted to contact him. Another representative from the Branch returned Mr. Regan’s call and spoke with him. In that conversation, it appears he was told that the hearing had concluded and was asked to return some unrelated documents he had been mistakenly sent by the Branch in his package containing the Notices and Demand. Mr. Regan acceded to the request of the Branch representative and sent the unrelated documents back.

SUBMISSIONS OF MR. REGAN

17. Counsel for Mr. Regan submits a Statutory Declaration of Mr. Regan, together with various exhibits. I have read the Statutory Declaration very carefully. I do not find it necessary to set out Mr. Regan's submissions in the Statutory Declaration verbatim here, but, instead, I will summarize relevant submissions below.
18. There are two (2) categories of submissions Mr. Regan makes in his Statutory Declaration. The first deals with submissions mounting a challenge to the delegate's conclusion that the Complainants were both employees of Mr. Regan. More particularly, Mr. Regan contends the Complainants were both independent contractors.
19. The second category of submissions in the Statutory Declaration pertains to Mr. Regan's explanation as to why he failed to attend at the hearing of the Complaints. He states that the package containing the Notices and the Demand from the Branch was delivered to a box at UPS in Whistler but misplaced by UPS. He states that Leo Mendoza, the Store Manager of UPS in Whistler, informed him that "the registered letter [from the Branch] was initially misplaced by UPS, such that it did not go to my box". He states that UPS subsequently "corrected this error, and placed the registered letter into my box".
20. He then states that the first time he attended at his box at UPS, after the above error was sorted out, was on August 16, 2014. Prior to that time, he learned about the hearing of the Complaints on August 11, 2014, when he received a voice mail from the Branch representative later in the day after the hearing had concluded. He states he was busy working all day and did not check his voice mail until much later in the day. By the time he returned the voice mail, he was advised that the hearing had already concluded and a decision made in his absence.
21. Mr. Regan states that he then sent the delegate an email on August 25, 2014, explaining his failure to attend the hearing, and attaches that email to his Statutory Declaration.
22. He also states in his Statutory Declaration that he spoke with Mr. Mendoza of UPS to obtain a letter from him to confirm UPS' error in misplacing the package containing the Notices and Demand from the Branch. He attaches Mr. Mendoza's letter he received as an exhibit to his Statutory Declaration. The letter is addressed "To whom this may concern" and states as follows:

We can confirm that Mr Eric Regan is a mailbox holder of suite 329 here at The UPS Store Whistler since March 8th 2009.

On June 16 2014, we received a registered mail item from the ministry of labor addressed to Mr Eric Regan of box 329. The mail item along with other items of the mailbox was not collected and signed for until August 16th 2014.

Mr Regan did not have access to the mail items until he visited the store on August 16th 2014 and signed for them during store hours.
23. Mr. Regan concludes his submissions in the Statutory Declaration stating that in these circumstances, he has "an arguable and meritorious defence", he did not "wilfully fail to take part in these proceedings" and that the reason he "failed to take part in these proceedings in the first instance is [as] a result of an error by UPS". He states that he took immediate steps to communicate with the Branch to take part in the proceedings and it would be "contrary to natural justice" if he was not afforded an "opportunity to defend [himself] in these matters".

24. Mr. Regan also submits that he is now producing, as exhibits to his Statutory Declaration, all the records that he was requested to produce previously.

ANALYSIS

25. As indicated previously, Mr. Regan is appealing the Determination on the basis that the Director breached the principles of natural justice in making the Determination. Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision maker. The principles of natural justice have been observed if the party is provided with information on the hearing process, has had a fair hearing, and has had a full opportunity to present his or her case (see *607730 B.C. Ltd. c.o.b. English Inn & Resort*, BC EST # D055/05, and *Re: Valmont*, BC EST # D008/14).
26. In this case, Mr. Regan, effectively, is arguing that he was not provided with the information relating to the hearing of the Complaints, nor given a fair hearing, nor provided a full opportunity to present his case because of the “error” by UPS when the latter “initially misplaced” the package sent from the Branch containing the Notices and the Demand.
27. As noted previously, Mr. Regan has attached, to his Statutory Declaration, a letter from the Store Manager of UPS, Mr. Mendoza. While the letter states “a registered mail item from the ministry of labor addressed to Mr Eric Regan of box 329” was received by UPS on June 16, 2014, and the “mail item along with other items of the mailbox was not collected and signed for until August 16th 2014”, it does not contain any admission of “error” by UPS. That is, the letter does not say what Mr. Regan purports it says. It does not say that UPS misplaced the mail from the Branch and this effectively prevented Mr. Regan from accessing his mail from the Branch until August 16, 2014. It may very well be, as reported by Mr. Mendoza in his letter, that Mr. Regan did not have access to his mail at the UPS store until August 16, 2014, when “he visited the store...and signed for (his mail) during store hours” but there is nothing in the letter that suggests that he was delayed from accessing his mail as a result of UPS’ error.
28. I also note that there is no mention in Mr. Regan’s Statutory Declaration that he did not receive the July 18, 2014, letter from the delegate enclosing Mr. Rattenbury’s records for the hearing. This letter also referenced the hearing date of Monday, August 11, 2014.
29. Having said this, I note that the Tribunal in *Re: British Columbia, the Director of Employment Standards*, BC EST # D051/98, stated:

The non-attendance of a party does not change the onus, which remains on the appellant to demonstrate error or a basis for the Tribunal to vary, cancel or confirm a Determination. As a matter of evidence, however, a non-attending party takes the risk that the attending party will tender sufficient and weighty evidence for the appellant to have met its tactical burden to persuade an Adjudicator to vary or cancel a Determination. A party who fails to appear at a hearing does take a risk that information or evidence helpful to Adjudicator [*sic*] may not be available to the Adjudicator. This proposition applies equally to an Employer, and Employee [*sic*] or the Director’s delegate. In the case of an appellant, non-attendance is generally fatal to an appeal. In the case of any other party, the non-attendance may or may not be fatal, depending on the circumstances of the case, the issues on appeal and whether the appellant meets the persuasive or tactical burden.

30. In this case, I find that Mr. Regan has not discharged the onus on him to demonstrate a basis for the Tribunal to cancel the Determination or to return the matter back to the Director. While he indicates that it was UPS’ error that prevented him from receiving notification of the Notices and the Demand and, thus, prevented

him from attending the August 11 hearing, I do not find his evidence in the form of a letter from Mr. Mendoza of UPS supportive of his assertion. In the circumstances, I do not find that Mr. Regan has established that the delegate failed to observe the principles of natural justice in making the Determination and, therefore, I find it is not open to Mr. Regan, at this stage, to present his case for the first time on appeal.

ORDER

- ^{31.} Pursuant to section 114(1)(f) of the *Act*, I deny the appeal. Pursuant to section 115 of the *Act*, I order that the Determination, dated September 10, 2014, be confirmed in the amount of \$7,800.04, together with whatever further interest has accrued under section 88 of the *Act* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal