



An appeal

- by -

Payless Paving Ltd.

- and by –

Apninder Singh Bahniwal

- 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/97 and 2004A/98

DATE OF DECISION: August 11, 2004



DECISION

SUBMISSIONS

Chaswinder Bhangu	on behalf of Payless Paving Ltd.
Apninder Singh Bahniwal	on his own behalf
Ken Elchuk	on behalf of the Director

OVERVIEW

This decision addresses appeals brought under Section 112 of the *Employment Standards Act* (the “Act”) by Payless Paving Ltd. (“Payless”) and Apninder Singh Bahniwal (“Bahniwal”) of a Determination dated May 4, 2004 by a delegate of the Director of Employment Standards (the “Director”).

The Determination found that Payless had contravened Part 3, Section 18, Part 4, Section 40, Part 5, Section 45 and Part 7, Section 58 of the *Act* in respect of the employment of Bahniwal and ordered Payless to pay wages and interest in the amount of \$10,430.59. The Director also imposed administrative penalties on Payless in the amount of \$2000.00.

Payless has grounded its appeal on an alleged failure by the Director to observe principles of natural justice in making the Determination. Payless says the Director refused to accept evidence submitted by Payless and, as a result, made errors about the hours worked, and wages that were owed, to Bahniwal. Payless also says the Director failed to properly examine the evidence which was provided resulting in Bahniwal being given credit for hours that he did not work. Payless has asked that the Tribunal allow it to present all of the evidence again and then to re-evaluate the case.

In his appeal, Bahniwal says the Director erred in law and failed to observe principles of natural justice by finding he had been paid wages in the amount of \$3726.00 on July 31, 2003.

In its appeal, Payless has requested an oral hearing. The Tribunal, however, has reviewed both appeals and the materials on file and finds that an oral hearing is not necessary in order to decide these appeals.

ISSUE

The issue in this appeal is whether either Payless or Bahniwal has shown any error in the Determination that justifies the intervention of the Tribunal to vary it, as requested, or refer it back to the Director.

THE FACTS

Payless operates a trucking company. Bahniwal was employed by Payless as a truck driver from February 7, 2003 until August 23, 2003 at a rate of \$18.00 an hour. Bahniwal complained he was owed regular wages, overtime, annual and statutory vacation pay and compensation for length of service.



An oral hearing was held on the complaint on March 19, 2004. At the hearing, both parties submitted records, and supporting evidence, relating to the hours worked by Bahniwal. The Director, “for the most part”, preferred the records provided by Bahniwal. He accepted Bahniwal’s record for those days where he had detailed the work performed and the hours worked and rejected his record for those days where he had not recorded in detail the work he had performed. The Director also found that “. . . the complainant received eight cheques in payment of his wages in the gross amount of \$9776.00.”

The Director denied Bahniwal’s claim for length of service compensation but found there were wages owing to him by Payless.

ARGUMENT AND ANALYSIS

The burden on Payless and Bahniwal in their respective appeals is to persuade the Tribunal that the Determination is wrong in the manner described by each of them and that the Tribunal should intervene to correct the error. 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.*

An appeal 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 or seek to have the Tribunal re-weigh the evidence provided to the Director.

Neither party seeks to submit any evidence that was not given to the Director.

Notwithstanding the grounds of appeal relied on in each of these appeals are expressed somewhat differently, both do no more than ask the Tribunal to review the evidence and material provided to the Director and reach a different conclusion.

Payless argues that the Director overlooked evidence showing Bahniwal was claiming for hours where he had not worked for Payless. In reply, the Director says the evidence referred to in the appeal was not “overlooked”, but rather was not accepted by the Director, who preferred the evidence of Bahniwal in respect of that part of his claim.

Payless also argues the Director made an error by not accepting that Bahniwal had been paid in advance (in 2002) for some work he did in 2003. The Director says this argument was made during the complaint hearing process and rejected on the evidence.

Bahniwal says the Director erred in finding he had received eight cheques, including three in July 2003, totalling \$9776.00. He says he received only two cheques in July 2003 – one dated 3 July 2003, for \$1800.00, and another dated 21 July 2003, for \$600.00. He says the other amount the Director found had been paid to him on July 31, 2003, an amount of \$3726.00, was never paid to him and no cheque in that



amount was ever issued to him. He says there was only a T4 issued to him for that amount. In response, the Director says the finding that Bahniwal had received that amount in July 2003 was based on the evidence of Payless presented at the complaint hearing and was supported by a pay statement for the period July 31, 2003 showing that amount was paid. The Director says that on this point, the evidence of Payless was preferred.

The Tribunal has accepted that in some circumstances errors on findings or conclusions of fact can amount to error of law. In that context, however, an appellant must show either there was no evidence to support the findings of fact made or that a view of the facts was taken by the Director that could not reasonably be entertained based on the evidence that was before the Director (see *Gemex Developments Corp. -and- Assessor of Area #12 - Coquitlam*, [1998] B.C.J. No. 2275 (BCCA)).

In these appeals, the Determination and the material on record, which is extensive, show there was some evidence to support the findings and conclusions of fact made by the Director and I cannot conclude the view of the facts taken by the Director was one that could not be reasonably entertained from the evidence that was presented to the Director at the oral hearing.

The appeals are dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 4, 2004 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal