

An appeal

- by -

G.P. Auto Repairs Inc.
(the "Employer")

- 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: Shera L. Skinner

FILE No.: 2004A/108

DATE OF DECISION: September 7, 2004

DECISION

SUBMISSIONS:

Paramjit Gill: on behalf of G.P. Auto Repairs
Robert (Scotty) Morrison: on behalf of the Director of Employment Standards
Imtiaz Ahmad: on his own behalf

OVERVIEW

This is an appeal by G.P. Auto Repairs (the “Employer”), pursuant to section 112 of the *Employment Standards Act* (the “Act), against a Determination issued on May 21, 2004 by Robert (Scotty) Morrison, a delegate of the Director of Employment Standards.

Imtiaz Ahmad (“Ahmad”) filed a complaint with the Director alleging that the Employer had contravened the Act in failing to pay him wages as per section 18 of the Act. During the process of the investigation, the Employer made a voluntary payment of \$772.00 (minus statutory deductions) based on hours worked from April 4, 2003 – May 2, 2003.

Following an investigation, the Director issued a Determination finding that the Employer owed a further \$1113.36 in wages plus \$58.00 in interest to Ahmad and a \$500 administrative penalty, totaling \$1671.36.

The Employer contends that the Director has failed to observe the principles of natural justice in making the Determination.

The Vice Chair of the Employment Standards Tribunal advised the parties that the matter would be decided on the basis of written submissions, and that an oral hearing would not be held.

FACTS

Imtiaz Ahmad completed his Automotive Service Technician program from BCIT in March, 2003. He started to look for work in early April, 2003 by going door to door to prospective employers. Ahmad contacted the Employer, and started to work there as a Mechanic Assistant on April 4, 2003. The terms of the employment are at issue, including whether it was paid work or volunteer work, the number of hours worked, and when the employment ended. There is no debate that Ahmad received no wage payments during the time he was with the Employer and that Ahmad had contacted HRDC to apply for a wage subsidy during April, 2003.

Originally, the Employer stated that it could not remember Ahmad at all. After Ahmad presented letters from neighbouring businesses confirming that he had been working at the Employer, the Employer’s position was that Ahmad volunteered his time during April of 2003. It also stated that it had been told by the wage subsidy representative that Ahmad could only be put on payroll as an employee once the wage subsidy agreement was signed and put into effect. This wage subsidy agreement was supposed to start on May 5, 2003, with Ahmad making \$10/hour, however it was not signed by the parties. The Employer stated that Ahmad simply disappeared when it was time to sign the agreement, and that he did not work

after May 5, 2003. The Employer provided a copy of a calendar with notes regarding Ahmad's hours on it for the months of April and May, 2003. The last date noted worked by Ahmad was May 2, 2003.

Ahmad's position was that he worked as an employee from April 4, 2003, not receiving payment until the wage subsidy agreement was in place (with the understanding that he would then be paid for all of his back wages). He stated that he worked from April 4, 2003 to May 22, 2003, and provided a copy of his diary with his starting and stopping times and total hours on it. Ahmad also stated that the employer dragged its feet responding to the inquiries of the wage subsidy representative until May 22, 2003. At this time, the wage subsidy agreement could have been signed, but Ahmad stated that the Employer asked him to agree to "repay" the Employer "under the table" for \$2.50/hour (in other words, Ahmad would receive the full \$10/hour partially paid by wage subsidy, but he would have to return \$2.50/hour to the Employer). Ahmad did not feel comfortable with this arrangement, and declined to sign the agreement, thereby resigning his employment. At this time, he asked for payment of his outstanding wages, and was denied.

During the course of the investigation, the delegate of the Director, Robert (Scotty) Morrison met with the parties on February 13, 2004. At this meeting, the parties agreed that Ahmad either worked for wages or volunteered at G.P. Auto Repairs as a Mechanic Assistant between April 4, 2003 and May 5, 2003. It was also agreed by the parties that during the month of April, 2003, Ahmad spoke with HRDC and a program called AWARE (Assisting with Awareness Regarding Employment) about a wage subsidy. Finally, it was agreed that the rate of pay would be \$8/hour. The parties did not agree whether Ahmad continued to work at the Employer from May 5, 2003 – May 22, 2003.

Continuing with the investigation, Robert (Scotty) Morrison wrote to the Employer on March 8, 2004 outlining the progress of the investigation, and the evidence gathered to date. He stated that there was evidence that Roy Codling, a representative of AWARE, had spoken with the manager of the Employer, El Tuason, on May 21, 2003, who advised that Ahmad had been working at the Employer since May 5, 2003. As such, the delegate suggested that it seemed that Ahmad should be paid at \$8/hour for all time worked between April 4, 2003 and May 22, 2003, according to Ahmad's diary of hours. A calculation was included with the letter, along with a request to pay this amount directly to Ahmad. The delegate stated that, if the Employer was not in agreement, it must forward any additional evidence and a Determination would be written. The Employer was advised that if there was a breach of the Act found, there would be a mandatory administrative penalty of \$500 levied against the Employer.

The Employer responded to the letter and included a cheque for \$772.00 (minus statutory deductions), which represented payment for April 4, 2003 – May 5, 2003 at a rate of \$8/hour. The Employer utilized its record of hours worked, not Ahmad's diary of hours worked. The Employer stated that its position had not changed with regard to the timeframe between May 5, 2003, and May 22, 2003. In other words, it did not have a record of these hours worked, and therefore refused to pay for them. The Employer attached a number of letters from neighbouring businesses in order to show that no one could recall Ahmad working at the Employer in May, 2003.

The delegate issued the Determination on May 21, 2004. He found that the Employer's version of the facts lacked credibility for a number of reasons, and therefore opted to accept Ahmad's version of events. Ahmad's diary of hours was accepted as evidence of a claim for wages under the Act. The Determination stated that the letters supplied by the Employer were not of assistance in determining the matter as they were not certain nor specific enough. The delegate also stated that it was not necessary to determine whether Ahmad agreed to volunteer his time because the Employer had voluntarily paid him for work done between April 4 and May 5, 2003, thus admitting that he was an employee, and Ahmad met the

definition of “employee” after May 5, 2003. Any agreement that Ahmad may have entered into to accept less than the minimum standards under the Act would not be valid under section 4 of the Act.

The Determination ordered the Employer to pay Ahmad for all hours worked (according to Ahmad’s diary) between April 4 and May 5, 2003, at the rate of \$8/hour (minus the payment already made). This totaled \$1113.36. Added to this was interest of \$58.00, and an administrative penalty of \$500. The total owing is \$1671.36.

ISSUES

The Employer appeals the Determination on the basis that the Director failed to observe the principles of natural justice. The Employer’s reasons are as follows: “Employer failed to recognize a fact that as per wage subsidy office Imtiaz Ahmad should not be put on payroll unless contract for wage subsidy is signed, which was never signed. Director also failed to recognize # of hours worked as per our record as provided by two of the neighbouring businesses.”

The Employer asks that the Tribunal change or vary the Determination. The reasons given are as follows: “Reduced hours worked to appropriate level, remove administrative penalty. Consider the fact that Imtiaz Ahmad initially came for observation, not for work.”

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 the appellant to persuade the Tribunal that a Determination is incorrect (*Natalie Garbuzova*, BC EST #D684/01). I am not persuaded that this burden has been met.

ANALYSIS

No new evidence has been given that was not in front of the Director.

The Employer argues that the Determination is incorrect because it failed to recognize as a fact that, as per the wage subsidy office, Ahmad should not be put on payroll until a wage subsidy agreement is signed (which it never was). The Director submits that “the argument regarding the wage subsidy was made during the investigation. The evidence provided by G.P. Auto Repairs was considered and dealt with in the Determination.”

While the Determination does not specifically consider the Employer’s argument about not being placed on payroll until a wage subsidy agreement is signed, I am not persuaded that this is fatal to the Determination. First, I find that the argument is simply a way to re-state the Employer’s argument that it was under the impression that Ahmad was volunteering his time up until May 5, 2003. The Determination states that it is not necessary to decide this point as the Employer voluntarily paid Ahmad for his work from April 4, 2003 – May 5, 2003. In so doing, the Employer admitted that Ahmad was an employee, under the control and direction of the Employer. There is no evidence that the nature of the work changed after May 5, 2003. I can not find any error in law or breach of natural justice in the delegate’s reasoning regarding this issue. The Employer voluntarily, and without condition, made the payment for work done between April 4, and May 5, 2003. This action was done in voluntary compliance

with the Act during the course of the investigation, and was not a settlement or compromise of the entire matter nor was it done on a without prejudice basis.

On an objective view of the facts, it is clear that Ahmad was an employee, not a volunteer, regardless of whatever misunderstandings the Employer may have had about when the wage subsidy office required him to be put on payroll. I add that, in any event, it is unlikely that the wage subsidy office would state that Ahmad can not be considered an employee before signing a wage subsidy agreement, as this is clearly erroneous, and there is evidence that the wage subsidy representative was fully aware that Ahmad had already begun working for the employer before May 5, 2003 (and before the signing of any wage subsidy agreement). It is more likely that a misunderstanding occurred when the wage subsidy representative explained to the Employer that the actual wage subsidy would not start until the agreement was signed.

The Employer's argument that the Director should have considered the initial hours of work as orientation, and not paid work, is yet another way to state the Employer's argument regarding volunteering.

An appeal is not a re-investigation of the complaint nor is it intended to be an opportunity for the parties to simply re-argue their positions and have the Tribunal re-weigh the same evidence that was before the Director. The remainder of the Employer's reasons for appeal seeks to do just that. The Employer states that the Director failed to recognize the number of hours worked according to the employer's calendar and the letters from the neighbouring businesses, and should reduce the hours accordingly. However, this is not a natural justice complaint. There is no evidence that the Director did not take all of this evidence into account. The reality is simply that the director weighed the evidence, and came to the conclusion that where the records of hours differed, he preferred Ahmad's record. This was due to a number of credibility problems with the Employer's evidence, as well as the fact that Mr. Tuason, the manager of the Employer, admitted to the AWARE representative that Ahmad was working as of May 5, 2003. The Director was in a better position to assess the credibility of this evidence, and I do not intend to interfere with his decision in this regard. The delegate also clearly considered the letters from the neighbouring businesses in the Determination, but simply decided not to place any weight on them, as they were neither specific nor certain enough.

Finally, the Employer argues that the administrative penalty should be removed. I have not found any errors of law or breaches of natural justice, and thus can only confirm the decision of the Director that there was a breach of the Act. As such, the mandatory administrative penalty applies. I do not have the jurisdiction to waive this penalty.

ORDER

I Order, under section 115 of the Act, that the Determination dated May 21, 2004 be confirmed in the amount of \$1671.36, plus any interest that may have accrued since the date of issuance.

Shera L. Skinner
Member
Employment Standards Tribunal