

An appeal

- by -

Faith-Entrust Drywall Group Inc.
("Faith-Entrust")

- 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/115

DATE OF DECISION: September 17, 2004

DECISION

SUBMISSIONS

Mary Dyck	on behalf of Faith-Entrust Drywall Group Inc.
Randall Bodnarek	on his own behalf
J.R. Dunne	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Faith-Entrust Drywall Group Inc. (“Faith-Entrust”) of a Determination that was issued on May 19, 2004 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Faith-Entrust had contravened Part 3, Sections 18 and 21, and Part 7, Section 58 of the *Act* in respect of the employment of Randall Bodnarek (“Bodnarek”), and one other employee, and ordered Faith-Entrust to pay Bodnarek an amount of \$1373.85, an amount which included wages and interest. The Determination also included an order relating to the other employee, but no issue on that part of the Determination arises in this appeal.

The Director also imposed an administrative penalty on Faith-Entrust under Section 29(1) of the *Employment Standards Regulation* (the “*Regulations*”) in the amount of \$1500.00.

Faith-Entrust says the Director erred. The appeal form does not state the grounds for appeal, but the submission sets out ten reasons for appealing the Determination.

The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in this appeal is whether Faith-Entrust has shown there is an error in the Determination that allows or justifies the Tribunal’s intervention under Section 115 of the *Act*.

THE FACTS

Faith-Entrust operates a drywall company. Bodnarek was employed by Faith-Entrust as a labourer between May 27, 2002 and February 27, 2003. Bodnarek filed a complaint with the Director alleging Faith-Entrust had contravened the *Act* by failing to pay regular wages in the periods January 2 to 24, 2003 and February 24 to 27, 2003, vacation pay, statutory holiday pay, overtime wages, wages for doing odd jobs such as maintenance on the employer’s truck and money to pay for physiotherapy.

The complaint was originally scheduled to be addressed by the Director in an oral hearing, but it was not possible to do so because Bodnarek was outside of the province, had no access to a land line telephone and his cellular phone was not working properly. The Director conducted an investigation on the

complaint based on the submissions and material provided by the parties. The Determination also notes that following the investigation, a letter was sent to Faith-Entrust, by regular mail and fax, containing an analysis of the payroll records with regard to the complaint issues but no reply was ever received by Faith-Entrust.

The Director made the following findings:

- Bodnarek was not entitled to vacation pay, statutory holiday pay or overtime wages.
- Bodnarek had worked for 62.5 hours in the period January 2 and 24, 2003 without being paid wages and was owed an amount of \$871.50 for that period.
- Bodnarek had worked for 23 hours in the period February 24 to 27, 2003 without being paid wages and was owed an amount of \$322.00 for that period.
- Bodnarek performed two deliveries and one garbage run and was not paid wages for those. He was entitled to be paid wages for the deliveries, but not for the garbage run. There was no record of the number of hours worked doing the deliveries. The deliveries were made on days when Bodnarek had no other work and, accordingly, he was entitled to minimum daily pay on those days. The Director found Bodnarek was owed an amount of \$56.00 for that work.
- Bodnarek was not entitled under the *Act* to reimbursement for physiotherapy treatments.

In making the finding on the amount of wages owing in the period February 24 to 27, 2003, the Director accepted the evidence provided by Bodnarek over the records submitted by Faith-Entrust.

ARGUMENT AND ANALYSIS

The burden is on Faith-Entrust, as the appellant, to persuade the Tribunal that the Director committed some error in making the Determination the Tribunal should intervene to correct that error. 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 complaint process. 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.

As indicated above, Faith-Entrust has listed ten reasons for this appeal. I will summarize each of the reasons:

1. The oral hearing was cancelled to accommodate Bodnarek; Faith-Entrust was “more than willing and able to attend” and oral hearing.
2. The records of the employer clearly indicate Bodnarek’s last day of work was February 27, 2003 and that he was paid up to that date.
3. The analysis letter, referred to in the Determination, was never received by Faith-Entrust.
4. Faith-Entrust has on-going issues with Bodnarek outside of the proceedings under the *Act*.
5. Faith-Entrust agrees Bodnarek should be paid for the free hours worked and has no issue with paying him for a total of 62.5 hours at a rate of \$14.00 an hour.
6. Faith-Entrust disagrees that Bodnarek was owed wages for 23 hours worked in the period February 24 to 27, 2003. Faith-Entrust says he worked only 8 hours in that period.
7. Faith-Entrust disagrees with the decision of the Director to accept Bodnarek’s records for the period February 24 to 27, 2003 over the records provided by them.
8. Faith-Entrust agrees to pay the 4 hour minimum for the free delivery/garbage run on January 17, 2003 and agrees to pay \$56.00 plus vacation pay, less appropriate deductions.
9. Bodnarek is appealing the physiotherapy issues to the Workers Compensation Board.
10. The penalties imposed are unjust in the circumstances.

Several of the above reasons raise matters that are not relevant to an appeal under the *Act*. Some of the reasons provided just confirm the correctness of the Determination.

A significant aspect of this appeal represents an attempt by Faith-Entrust to have the Tribunal review the decision of the Director to accept the records provided by Bodnarek for the period February 24 to 27, 2003 and to reach a different conclusion than the Director about how many hours Bodnarek worked in that period. However, the conclusion of the Director about how many hours Bodnarek worked in that period is a finding of fact. The *Act* does not list error of fact as a ground of appeal. The appeal must be confined to those grounds listed in subsection 112(1), above.

The appeal does not show any error in law by the Director. The Director was entitled to accept and consider the records provided by both Bodnarek and Faith-Entrust for the February 24 to 27, 2003 period. Those records conflicted on how many hours Bodnarek had worked in that period. The Director chose the records provided by Bodnarek over those provided by Faith-Entrust and provided reasons for doing so. While in some circumstances, that choice may amount to an error of law, no such error is shown here.

The administrative penalties about which Faith-Entrust complains resulted from provisions of the *Act* and the *Employment Standards Regulations* that make the issuance of such penalties mandatory upon findings of contravention of the *Act* or *Regulations*. In *Director of Employment Standards (Re Summit Security*

Group Ltd.), BC EST #RD133/04 (Reconsideration of BC EST #D059/04), the Tribunal explained the legislative objective for those provisions:

As noted by the Tribunal in *Royal Star Plumbing, Heating & Sprinklers Ltd.*, BC EST #D168/98, administrative penalties generated through provisions of the *Employment Standards Regulation* are part of a larger scheme designed to regulate employment relationships in the non-union sector. Such penalties are generally consistent with the purposes of the *Act*, including ensuring employees receive at least basic standards of compensation and conditions of employment and encouraging open communication between employers and their employees. The design of the administrative penalty scheme under Section 29 of the *Employment Standards Regulation*, which provides mandatory penalties where a contravention is found by the Director in a Determination issued under the *Act*, meets the statutory purpose providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*.

Neither does the appeal show the Director failed to observe principles of natural justice in making the Determination. The Director is given authority to investigate complaints and in doing so is not bound to conduct oral hearings. The *Act* requires that a person under investigation be given a reasonable opportunity to respond. It is clear from the material on file that opportunity was provided to Faith-Entrust. As Ms. Dyck indicates in the appeal submission, the Director knew “full well where Faith-Entrust stood on this matter”. There is some dispute about whether the Director provided the analysis of the payroll records to Faith-Entrust before issuing the Determination, but the provision of such analysis is not, in the circumstances of this case, a necessary aspect of compliance with principles of natural justice. In any event, as indicated above, Faith-Entrust has made its point on the Director’s decision to rely on Bodnarek’s records and has not shown there was any reviewable error in that decision.

There is no issue relating to new, or fresh, evidence.

In sum, Faith-Entrust has not shown any error in the Determination which would allow or justify intervention by the Tribunal under Section 115 of the *Act*. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determinations, dated May 19, 2004, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal