

An appeal

- by -

Andrew Minter operating as Total Roofing  
("Minter")

- 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/147

**DATE OF DECISION:** October 15, 2004

## DECISION

### SUBMISSIONS

Andrew Minter	on his own behalf
David W. Lysohirka	on his own behalf
Ed Wall	on behalf of the Director

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Andrew Minter operating as Total Roofing (“Minter”) of a Determination that was issued on July 16, 2004 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Minter had contravened Part 3, Sections 18 and 28, Part 4, Section 40, Part 5, Section 45 and Part 7, Section 58 of the *Act* in respect of the employment of David W. Lysohirka (“Lysohirka”) and ordered Minter to pay Lysohirka an amount of \$2266.15, an amount which included wages and interest.

The Director also imposed an administrative penalty on Minter under Section 29(1) of the *Employment Standards Regulation* (the “*Regulations*”) in the amount of \$2500.00.

Minter says the Director erred in law and failed to observe principles of natural justice in making the Determination.

Minter has requested an oral hearing for this appeal. The Tribunal, however, 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 Minter has shown there is any error in the Determination which would allow or justify the Tribunal’s intervention under Section 115 of the *Act*.

### THE FACTS

Minter operates a roofing business. Lysohirka was hired by Minter August 1, 2003 and worked until January 4, 2004. He was paid at a rate of \$18.00 an hour.

Lysohirka filed a complaint with the Director alleging Minter had contravened the *Act* by failing to pay him all wages owed. The Director investigated. During the investigation, three issues were identified and considered by the Director: what wages had Lysohirka earned; what wages was Lysohirka actually paid; and whether there were any wages still owing.

The Determination indicates the Director determined what wages Lysohirka had earned by taking the number of hours Minter had recorded for Lysohirka in his payroll book and entering that information into

the Employment Standards Branch wage calculation computer program. The Director found that Lysohirka had earned \$17,321.52 in wages, statutory holiday pay and annual vacation pay during his employment with Minter.

The Determination indicates the Director, faced with conflicting information about what wages had been paid to Lysohirka, accepted the information provided by Minter on an amended T4 form for 2003 earnings which was sent to Canada Customs and Revenue Agency (“CCRA”) and “the only wage statement” – for the period January 1 – 13, 2004 – submitted by Minter during the investigation. The Director accepted the T4 information “because of the strong sanctions against providing incorrect information on a T4 form”. The Director found Lysohirka was actually paid wages in the amount of \$15,102.00 during his employment.

Based on the above information, the Director found Lysohirka was owed wages in the amount of \$2,219.52, plus interest under Section 88 of the *Act* and issued a Determination in that amount.

The Director also found Minter had contravened several provisions of the *Act* and issued administrative penalties for those contraventions.

## ARGUMENT AND ANALYSIS

The burden is on Minter, 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.*

Minter alleges the Director erred in law. The appeal does not identify the alleged error of law nor does Minter provide any analysis or argument to support this ground of appeal. Neither does the appeal identify how the Director failed to observe principles of natural justice in making the Determination.

The appeal and the submission which accompanies it appears to raise three matters, which I will briefly summarize:

- Lysohirka made mistakes and he agreed to correct those mistakes at no cost to Minter;
- All employees are paid only straight time for travelling; nobody gets paid overtime rates for travelling, even if the travelling results in an employee working in excess of 8 hours in a day;

- The investigating delegate issued the administrative penalties against Minter because of other complaints that went to the Director and because Minter would not settle this complaint; and
- Lysohirka was paid “fair and square”.

In reply, the Director says the first two matters raised in the submission are entirely answered by Section 4 of the *Act*, which prohibits any agreement to waive the requirements of the *Act*, and by Section 21 of the *Act*, which in effect prohibits an employer from allowing an employee to fix mistakes on his own time.

The Director says Minter is mistaken on the third point and that the administrative penalties were issued in accordance with the provisions of the *Act* and the *Employment Standards Regulation* which make such penalties mandatory where a contravention of the *Act* is found.

The final point is simply a statement of opinion expressing disagreement with the conclusion that Lysohirka is owed wages.

Lysohirka has also filed a response. It speaks to whether a hearing is needed, which has already been addressed above, and expresses some disagreement with assertions made by Minter. For the most part, those areas of disagreement have no bearing on the merits of this appeal.

To be successful in this appeal, Minter must, at least, show there is some sound reason for the Tribunal to allow the appeal and grant the relief sought – in this case, cancellation of the Determination. He has not done that.

The Director’s observations concerning the application of Sections 4 and 21 of the *Act* are correct. The *Act* does not allow an employer to make deals with its employees that are less than the minimum standards provided by the *Act*. In the circumstances here, Minter is not allowed to agree with his employees that travel time, which in this case is “work”, will only be paid at straight time when the *Act* requires that overtime be paid because the employee has worked more than eight hours in a day or 40 hours in a week. Minter may not require or allow an employee to work for less than minimum wage. More specifically, he may not allow an employee to fix mistakes on his “own time”.

In respect of the administrative penalties, Minter has not shown the Director erred in finding he had contravened the provisions of the *Act* upon which the administrative penalties are based. Nor has he shown the administrative penalties were imposed for matters unrelated to the complaint made by Lysohirka and the conclusions reached by the Director on that complaint.

The provisions of the *Act* and the *Employment Standards Regulation* applied to the findings made in this case mandated the administrative penalties imposed. In *Director of Employment Standards (Re Summit Security Group Ltd., BC EST #RD133/04*, a reconsideration panel of the Tribunal said the following about the nature of administrative penalties:

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*. Such an interpretation and application of the *Act* is also consistent with the modern principles of, or approach to, statutory interpretation noted by Driedger, *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983, p. 87 ff. and the nature and purpose of employment standards legislation as explained by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, which was cited by the Tribunal in *J.C. Creations Ltd. 0/a Heavenly Bodies Sport*, BC EST # RD 317/03 (Reconsideration of BC EST # D132/03).

This appeal must be dismissed. It does not show that any error of law was made by the Director and does not show any failure by the Director to observe principles of natural justice in making the Determination. Minter undoubtedly disagrees with the Determination and seeks another perspective on his position, but as indicated above, an appeal under the *Act* is not intended to be a re-investigation or an opportunity to simply re-argue a position that was not accepted during the investigation.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated May 18, 2004 be confirmed in the amount of \$4,766.15, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**