

Appeals

- by -

Quality Paving Ltd.

and

Jeffrey Walker

- 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: Carol Ann Hart

FILE No.: 2005A/106 & 2005A/166

DATE OF DECISION: November 22, 2005

DECISION

SUBMISSIONS

Jeff Walker	on his own behalf
Rick Sakhon	on behalf of Quality Paving Ltd.
Graham Jickling	on behalf of the Director

OVERVIEW

1. This decision concerns two separate appeals, one filed by Quality Paving Ltd. and one filed by Jeff Walker pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). The parties appeal from a Determination issued on May 13, 2005 by a delegate of the Director of Employment Standards (the “Director”).
2. In the Determination, the delegate for the Director found that Quality Paving Ltd. (“Quality Paving”) had contravened sections 40, and 63 of the *Act*, and ordered that Quality Paving pay overtime, compensation for length of service, and accrued interest required under section 88 of the *Act*.
3. The appeal was brought by Quality Paving on the basis that the Director had failed to observe the principles of natural justice in making the Determination.
4. The appeal filed by Jeff Walker was brought on the grounds that evidence had become available which was not available at the time the Determination was made. Mr. Walker’s appeal was filed outside of the time frame permitted for filing an appeal under the *Act*. The Tribunal issued a decision dated September 13, 2005 (BC EST #D119/05) in which Mr. Walker was granted the requested extension of time to file the appeal.
5. The Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUES

6. The issues to be decided in these appeals are the following:
 1. Did the Director fail to observe the principles of natural justice in making the Determination?
 2. Should the Determination be cancelled or referred back to the Director on the basis that there is new evidence which was not available at the time the Determination was made?

THE FACTS

7. Jeffrey Walker worked for Quality Paving Ltd. as a Paver journeyman from June 15, 2003 to February 28, 2004. Mr. Walker filed a complaint under the *Employment Standards Act* alleging that Quality Paving Ltd. had failed to pay him overtime; and that his employment was terminated without notice or compensation for length of service.

ARGUMENT

Appeal Filed by Quality Paving

8. Mr. Sakhon maintained that the Director had failed to observe the principles of natural justice in making the Determination. The appellants submitted that the Director had erred in relying on Jeff Walker's calendar with respect to his hours of work, when Quality Paving had proved at the hearing that the calendar was not accurate on several dates. In Mr. Sakhon's submission, the calendar submitted by Mr. Walker was inaccurate in two main respects. The calendar indicated that Mr. Walker had worked in the first half of January. This was not correct because Quality Paving was engaged in snow removal at that time, and Mr. Walker had never worked in snow removal. Secondly, Mr. Walker had stated that he had not included travel time in his hours on the calendar, and this was untrue.
9. It was Quality Paving's position that a calculation sheet it had provided showed that Mr. Walker had been overpaid, even based on calculations at the hourly rates of \$24.04 per hour and \$36.06 for overtime which were used by the Director.
10. Mr. Walker submitted that the decision of the delegate for the Director was "*fair and just for what evidence he had at the time of adjudication*". However, he requested that the new evidence he had submitted with his own appeal be considered. Mr. Walker wrote that for some of the grading jobs he had worked on, he had worked alone, but he could not find a record showing that he had worked alone. He had done all of the following duties for Quality Paving: "*welding, logging, fabricating, grading, paving*", and "*teaching special techniques such as raking, curbs, swales and grading*".
11. The Director's delegate noted that the appellants had provided no argument in the appeal regarding compensation for length of service. Mr. Jickling noted that the appellants maintained that there was a denial of natural justice because the Director had used Mr. Walker's record of hours, which it submitted contained errors. According to the delegate for the Director, the evidence and arguments raised by the appellants had already been considered and addressed in the Determination.

Appeal Filed by Jeffrey Walker

12. The appellant wrote that since the hearing, a tape recording of a conversation between his wife and Roger Sakhon's secretary, and receipts for gasoline purchased in 2003 had been found. Mr. Walker indicated that he had not been able to locate the tape recording or the receipts before the Determination was issued because of a move of his residence.
13. According to the appellant, the gasoline receipts demonstrated that he had worked on a number of days on which Quality Paving had claimed that he had not worked. He wrote that he had not submitted all of the gas receipts because some could not be identified due to their condition. Mr. Walker wrote that the record

of hours he had provided to the delegate was accurate, and he submitted that he should be paid for all of his overtime hours.

14. Mr. Sakhon's position was that the gas receipts did not prove Mr. Walker's working hours. He submitted that because the receipts were for cash and debit, there were no signatures on the receipts, and the gasoline expenses could have been incurred by Mr. Walker or his wife. A spreadsheet with comments concerning the gasoline receipts was submitted by Mr. Sakhon. His evidence was that some of the receipts were submitted for days Mr. Walker was not working, and some of the receipts showed that he was fuelling up during the time he was working.

ANALYSIS

15. Subsection 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision reads:

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 being made.*

16. The appeal of Quality Paving was brought pursuant to section 112(1)(b) of the *Act*. Mr. Walker brought his appeal under section 112(1)(c) of the *Act*. Each of the appeals will be addressed separately below.

Appeal Filed by Quality Paving

17. Principles of natural justice are, in essence, procedural rights to ensure that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. The Tribunal has previously held that when the Director and the delegates for the Director conduct investigations into complaints filed under the *Act*, they are acting in a quasi-judicial capacity. Consequently, they must perform their functions in an unbiased and neutral fashion. The parties are entitled to procedural fairness and must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (See *BWI Business World Incorporated* BC EST #D050/96).
18. The burden rests with the party alleging an error of natural justice, to demonstrate that error. An appeal to the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination.
19. It is not appropriate for the Tribunal to interfere with the findings of fact made by the Director if they do not amount to the kind of errors contemplated by s.112 of the *Act*, even if the Tribunal might not have reached the same findings of fact.
20. The Determination and the documents contained in the record which was before the delegate for the Director show that Quality Paving had pointed out inconsistencies between their records and the records

of Mr. Walker. The delegate for the Director found that “*there was no meaningful rebuttal regarding the disputed days that [Mr. Walker] was apparently not working*” and accepted the submissions of the Quality Paving “*to the extent that the hours should be modified to correct these errors*”. The delegate further wrote as follows in the Determination: “*Otherwise I accept the balance of hours claimed as being reasonable and accurate*”.

21. The Determination and the extensive documentation on the file show that there was evidence to support the findings and conclusions reached by the delegate for the Director, and the delegate had considered the evidence and submissions of the parties. Quality Paving has not established that the delegate for the Director failed to observe the rules of natural justice. The appeal brought by Quality Paving is therefore dismissed.

Appeal Filed by Jeffrey Walker

22. In Bruce Davies and others, Directors or Officers of Merilus Technologies Inc., BC EST #D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

23. This ground of appeal is not designed to permit a person to gather new evidence after receiving a Determination with which he or she is dissatisfied. It is a key aspect of the test that the evidence the appellant seeks to present was not available at the time the Determination was made. The Tribunal must be convinced that all four of the conditions set out above have been satisfied.

24. Mr. Walker submitted fifteen pages of photocopied receipts for gasoline purchases. He wrote in his submission with the appeal as follows:

The gas receipts that I kept for tax purposes show that their (sic.) are very few hours that Mr. Sakhon had correct. These receipts prove that their (sic.) are many days that Mr. Sakhon says that I did not even work, yet every gas receipt that I have kept is from gassing up before work in between job sites and at the end of the day.

25. Mr. Walker also submitted a tape recording (and a transcription) of a conversation between his wife and Mr. Sakhon’s secretary which had taken place on March 9, 2004.

26. The appellant failed to establish based on the evidence presented, that all of the four conditions for new evidence to be considered by the tribunal had been met.

27. With respect to the first condition, there was no indication in the Determination that the appellant had advised the delegate for the Director that he wished to submit the receipts for gasoline or the tape recording. He did not request an adjournment of the hearing or additional time during the investigation to allow him to attempt to locate the receipts or the tape recording. The appellant could have had his wife and Mr. Sakhon's secretary testify about their conversation at the adjudication hearing. In that situation, the witnesses would have been subject to cross-examination.
28. The hearing before the delegate for the Director was held on October 18, 2004. The receipts were for gasoline purchased in 2003 and, according to Mr. Walker, the tape recording had been made on March 9, 2004. Mr. Walker indicated that he had thought these items were lost in his move, but he had later been able to locate them. The evidence was that Mr. Walker had moved his residence between March 1-15, 2004.
29. There was a period of approximately seven months between the time of Mr. Walker's move and the time of the adjudication hearing. I find that the evidence in question could have been discovered and presented to the delegate for the Director prior to the Determination being made had the appellant exercised due diligence.
30. I am satisfied that the second condition, the requirement that the evidence be relevant to a material issue arising from the complaint, has been satisfied. The appellant submitted the gasoline receipts and the tape recording with respect to the matter of the number of hours he had worked. The number of hours worked by the appellant is a material issue arising from the complaint.
31. The third and fourth conditions were of significant concern to me. The receipts for gasoline do not constitute sufficient evidence of the dates on which the appellant worked. The appellant asserted in his submissions that every gasoline expense had been incurred by him, and each receipt represented the cost of filling his tank before, during or after work. Mr. Walker did not indicate how he could be certain of this fact, given that the receipts for gasoline were all dated in 2003, and his submissions for his appeal were prepared in 2005.
32. According to Mr. Walker, the cassette tape recording was evidence of a conversation between his wife, and Mr. Sakhon's secretary. The conversation is based on hearsay evidence. Such evidence does not have significant probative value with respect to Mr. Walker's days of work.
33. The delegate for the Director had before him conflicting evidence regarding the days of work of Mr. Walker. He heard the evidence and submissions of the parties concerning the disputed evidence at the adjudication hearing. The delegate wrote in the Determination as follows:
- I have reviewed the calendar of alleged hours of work and compared it to the hours the employer submitted. In view of the fact there was no meaningful rebuttal regarding the disputed days that he [Jeff Walker] was apparently not working I accept the submission of the employer to the extent that the hours should be modified to correct these errors. Otherwise I accept the balance of hours claimed as being reasonable and accurate. The summary of calculations attached to this determination corrects these errors and identifies the balance payable.*
34. As set out above, it appears that the appellant did not advise the delegate for the Director that he wished to submit the receipts for gasoline or the tape recording. He also apparently did not request an adjournment of the hearing, or additional time during the investigation prior to the Determination being issued to allow him to attempt to locate the evidence.

35. The delegate for the Director found that there was no meaningful rebuttal by the appellant regarding the days he was apparently not working. An appeal is not a second opportunity to present evidence and arguments. I cannot find that the gasoline receipts, the tape recording, and the assertions of the appellant have such high potential probative value that they could have led the Director to a different conclusion on the material issue of Mr. Walker's days of work.
36. I dismiss the appeal of Jeff Walker on the basis that there was new evidence which was not available at the adjudication hearing.

ORDER

37. Pursuant to Section 115 of the *Act*, the Determination dated May 13, 2005 is confirmed.

Carol Ann Hart
Member
Employment Standards Tribunal