



An appeal

- by -

Tyler Wilbur operating Mainline Irrigation and Landscaping

- 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:** John Savage

**FILE No.:** 2005A/187

**DATE OF DECISION:** December 19, 2005

## DECISION

### SUBMISSIONS

Tyler Wilbur, for the Employer, Tyler Wilbur operating Mainline Irrigation & Landscaping

Chris Baker, for the Employee

J. Ross Gould, for the Director of Employment Standards

### OVERVIEW

1. Chris Baker, (the “Complainant”), filed a complaint under section 74 of the *Employment Standards Act* (the “*Act*”) alleging that Tyler Shawn Wilbur, operating as Mainline Irrigation and Landscaping, (the “Employer”), contravened the *Act* by failing to pay wages.
2. An investigation was conducted and the Delegate on June 23, 2005 issued a written decision finding that (1) wages were owed in the amount of \$3216.10 and (2) imposing administrative penalties in the amount of \$1500.00 for three contraventions of the *Act*.
3. The Employer filed an appeal that would have been timely but wrongly addressed the appeal to the Director instead of this Tribunal. Pursuant to section 109(1)(b) of the *Act*, I allowed the Employer’s application to extend time and so am hearing the appeal on the merits.
4. The Employer’s appeal alleges that the Director’s Delegate erred in law and failed to observe the principles of natural justice in making the determination (see subsections 112(1)(a) and 112(1)(b) of the *Act*).
5. The Delegate made various efforts to contact the Employer but the Employer did not respond to those efforts. Thus the Delegate was left with the information received from the Complainant and rendered a decision based on this evidence. In these circumstances the Employer alleges there was a breach of natural justice because the Delegate heard only one side of the story.
6. In making the decision to extend time to perfect the appeal, I directed the parties to address the merits of the appeal and, in particular, to address the question of whether there was a breach of natural justice in the circumstances giving rise to the Determination of the Delegate. The Complainant and the Delegate filed submissions. The Employer does not make any submission.
7. Although the Employer alleges an error of law in the Determination I agree with the submissions of the Director that no error of law is specified apart from the breach of natural justice alleged. If there is breach of natural justice then the appropriate remedy is to have the matter referred back to the Director for reconsideration.

## ISSUE

8. The only issue is whether the Delegate breached the rules of natural justice and denied the Employer an opportunity to be heard in the circumstances of this case.

## DISCUSSION AND ANALYSIS

### *A. Factual Background*

9. It will be useful to review the circumstances that give rise to the Determination.
10. According to the Complainant he was not paid wages, contacted the Employment Standards Branch and was issued a Self-Help Kit. The Complainant sought to contact the Employer but, according to the Complainant, the Employer was being evasive. Eventually the Complainant tacked the completed Self-Help Kit to the door of the Employer's place of residence. The Employer denies receiving the Kit.
11. The Delegate after hearing from the Complainant commenced nothing short of a Herculean effort to contact the Employer. Numerous telephone calls were made, messages were left on answering machines, letters were sent, and a colleague of the Employer was contacted.
12. The Delegate enumerates that some sixteen telephone calls were made, at least five telephone messages left on answering machines, letters were sent and at least one successfully delivered by certified mail. According to the Delegate, an associate of Mr. Wilbur, Mr. Christian Ardilles was contacted, and Mr. Ardilles confirmed that the message was passed on by him to the Employer that the Employer should contact the Employment Standards Branch.
13. As I have noted, the Employer never presented his position on the issues to the Delegate. The Employer in his appeal denies receiving the self help kit from the Complainant. He denies knowledge of messages asking him to contact the Employment Standards Branch. Further, the Employer failed to make any submission, after being given the opportunity in this appeal, concerning the specific efforts to contact him made by the Delegate.

### *B. Audi Alteram Partem*

14. The Latin phrase *audi alteram partem*, which means hearing both sides fairly, describes the duty to act judicially. In essence, the parties to a dispute are entitled to know the case against them and to be heard by, and make submissions to, the decision-maker.
15. The several rights that arise out of this duty are: the right to notice, the right to be heard (although not necessarily to have an oral hearing), the right to know the case to be met and to answer it, the right to cross-examine witnesses (in appropriate circumstances), the right to counsel, and the right to a decision on the evidence: *D. Jones & A. de Villars, Principles of Administrative Law*, (Toronto: Carswell, 1985) c. 8 at 197-241; *Hundal v. Superintendent of Motor Vehicles* (1985), 32 M.V.R. 197 (B.C.C.A.); *Murphy v. Dowhaniuk* (1986), 22 Admin. L.R. 81 (B.C.C.A.); *R. v. Canada Labour Relations Board* (1971), 18 D.L.R. (3d) 226 (Man. C.A.), *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, [1994] 2 W.W.R. 422, *Re City of Vancouver and Assessment Appeal Board et al.* (1996), 135 D.L.R. (4th) 48.

16. This common law duty is proscribed by section 77 of the *Act*:
- 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond. 1995, c. 38, s. 77.
17. The procedures under the *Act* are designed to give fair treatment to employers and employees and to provide fair and efficient procedures for the resolution of disputes: sections 2(b), 2(d), *Re Slumber Lodge Motel*, BC EST # D099/05.
18. The evidence of the Delegate and the Complainant, summarized in the Determination and referenced in the submissions in this appeal, calls for an explanation from the Employer. That is, the fact that the Delegate asserts that (1) numerous messages were left for the Employer on his telephone, (2) a certified letter was successfully delivered, and (3) a colleague of the Employer confirmed that the Employer received notice to contact the Branch, require some response from the Employer. No explanation is forthcoming.
19. The absence of an explanation from the Employer entitles an adjudicator to draw an adverse inference, such as where a party with knowledge of a material fact fails to testify: *L. (F.A.) v. B. (A.B.)* (1995), 125 D.L.R. (4th) 640 (Man. C.A.). Such failure amounts to an implied admission that the evidence does not support the party's case: J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (1999), at p. 297; *R. v. Jolivet*, [2000] 1 S.C.R. 751, 2000 SCC 29, 185 D.L.R. (4th) 626, at para. 28.
20. The requirement for notice, to know the case to be met, and to answer it, is not, in my opinion, abrogated where the lack of notice arises because an appellant turns a blind eye to or evades notice of a proceeding. In my opinion this is the inescapable inference from the evidence before me and the lack of response from the Employer.
21. Moreover, I am satisfied that in the circumstances of this case the Director made more than reasonable efforts to give the Employer under an investigation an opportunity to respond. There has been no breach of natural justice.

## ORDER

22. The appeal is dismissed and the Determination of the Delegate is confirmed.

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**John Savage**  
**Member**  
**Employment Standards Tribunal**