

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, C. 113

- By -

Gary Darbyson
("Darbyson" or the "Employee")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	1999/204
DATE OF HEARING:	July 5, 1999
DATE OF DECISION:	July 13, 1999

DECISION

APPEARANCE

Mr. Gary Darbyson	on behalf of himself
Mr. Gary J. Morneau ("Morneau")	on behalf of Don L. Weik and Gary J. Morneau operating as Hatzic Isle Enterprises (the "Employer")
Mr. Don L. Weik ("Weik")	on behalf of Don L. Weik and Gary J. Morneau operating as Hatzic Isle Enterprises (the "Employer")

FACTS AND ANALYSIS

This is an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued on March 19, 1999.

Darbyson disagrees with the Determination which dismissed his claim for regular wages, overtime wages, vacation pay, statutory holiday pay and compensation for length of service. Darbyson had claimed to be an employee of the Employer between November 4, 1997 and February 7, 1998. The Determination agrees that Darbyson was an employee of the Employer and briefly states:

"I have completed my investigation into these allegations. These are my findings:

A demand for Employer Records was issued to the named employers on 1 September, 1998. There was no response to this demand nor to a second demand and as a consequence, a penalty determination was issued on 15 October, 1998 imposing a fine of \$500.00.

When a Demand Notice was served on the bank account of Mr. Gary J. Morneau for the purpose of collecting the \$500.00, he sent a money order to the Director of Employment Standards in the belief that the demand was for wages owing to you <Darbyson>. I took this as confirming evidence that you were employed by him and his partner Don L. Weik. He also told me that he thought it was Mr. Weik's responsibility to pay you. Mr. Weik, for his part, never denied that you worked for him. He said that his payroll records were stolen from his car.

You provided me with a hand-written list of the hours you believe you worked; however, these were not made commensurate (sic) with your work and are therefore not reliable. I cannot accept them as good evidence of wages owing. There is also no evidence of an agreed hourly wage. As a result, I must dismiss your complaint.”

This is the entire Determination.

In my view, the Determination is wrong. From a cursory review of the appeal file, including the Determination, it is readily apparent that there are several issues between the parties, including:

1. When did Darbyson’s employment commence and when did it come to an end? If the delegate did not agree with the dates indicated by the complainant, what were the reasons?
2. What were the dates and hours worked? Were there wages owing at the regular or overtime rate? Was there any statutory holiday pay owing?
3. What was the hourly (or other) rate agreed upon between the parties? I note in that regard that in the complaint form, when he filed his complaint with the Employment Standards Branch, Darbyson indicated that his hourly rate was \$15.00.
4. Did the complainant get paid--in whole or part--by the Employer? How did he get paid?
5. The extent of the Employer’s participation, ultimately, in the investigation and the effect of that?
6. Was Darbyson’s employment terminated? If it was, when and what consequences flow from such termination?

First, it is clear that the Determination--on its face--does not address the issues raised by the complaint. Subject to Section 76(2), the delegate must investigate a complaint under Section 74 (Section 76(1)) and may, ultimately, subject to the *Act*, make a determination (Section 79). Section 76(2) provides, *inter alia*, that the delegate “may refuse to investigate a complaint or may stop or postpone investigating a complaint” for a number of reasons: the Act does not apply to the complaint, the complaint is frivolous, vexatious or trivial or not made in good faith, or there is not enough evidence to prove the complaint. Under Section 79, the delegate may make a Determination. If the delegate is satisfied that the requirements of the *Act* and *Regulation* have not been contravened, the delegate must dismiss the complaint; if, on the other hand, the delegate is satisfied that the *Act* and *Regulation* have been contravened, the delegate may do one or more of the following: require compliance, remedy or cease the contravention, impose a penalty or impose a penalty. In this case, the delegate states that he “completed” his investigation and, subsequently, issued the Determination now under appeal. It does not appear that the delegate did

not complete the investigation for any of the reasons provided in Section 76(2), and in fact, he made the Determination to dismiss the complaint. In doing so, in my view, the delegate is obligated to consider in good faith the all the issues before him to determine whether or not the *Act* and *Regulation* have been contravened.

Second, where the delegate makes a determination, it must include “the reasons for the determination” (Section 81(1)(a)). In the case at hand, the delegate rejected Darbyson’s records because they were not made contemporaneously. Ultimately, the delegate is entitled to make that decision. However, the simple fact that the records were not made contemporaneously does not necessarily make them unreliable. In any event, the delegate did not attempt to otherwise determine the dates and hours worked. Having made the determination that Darbyson was an employee, presumably he worked certain hours on certain dates, the delegate must determine those dates and hours worked or, for example, that he is unable to determine dates and hours worked. The delegate must attempt to arrive at a reasoned conclusion in that respect. He did not do that. Moreover, the Determination is wrong when it states that there is no evidence of an agreed hourly wage rate. The complaint form states that Darbyson indicated that his hourly rate was \$15.00. In other words, there was some evidence before the delegate. He was certainly entitled to reject the Darbyson’s claim in that regard. However, the delegate is required to provide reasons why he did not accept the Darbyson’s claim.

In the circumstances of this particular case, it is clear that there is considerable disagreement between the parties with respect to the facts surrounding the issues set out above. Most of these factual allegations are not referred to in any manner in the Determination. I make no finding with respect to those. However, I am of the view that I cannot render a decision without conducting the investigation into the actual merits of the case which should have been conducted by the delegate. In my view, taking on the investigatory role, conflicts with the appellate nature of the Tribunal and the process before it as provided for in the *Act*.

In the circumstances, and except for the finding (which, in any event is not in dispute) that Darbyson was an employee of the Employer, I am of the view, that the matter in its entirety, should be referred back to the director for such investigation, as she considers necessary, and a determination. In view of the time that has passed, it is only appropriate that such an investigation be carried out and a determination rendered without undue delay.

At the outset of the hearing, Darbyson expressed concern about a “restraining order” issued against him prohibiting any form of contact between himself and Weik (and--apparently--Weik’s spouse). He was concerned that he could be jailed for breach of this order. The order was not in evidence at the hearing. Morneau stated for the record that the Employer consented to dealing with this matter in the hearing, which could not proceed if either the Employer or the Employee could not be present. Weik did not indicate a concern. In the result, the proceeding continued.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination in this matter, dated March 19, 1999 be referred back to the Director.

**Ib Skov Petersen
Adjudicator
Employment Standards Tribunal**