

An appeal

- by -

Harjinder Singh Gill operating as S & G Roofing
("Gill")

- 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

ADJUDICATOR: Carol L. Roberts

FILE No.: 2002/273

DATE OF DECISION: July 15, 2002

DECISION

This is a decision based on written submissions by Harjinder Gill on behalf of S.& G. Roofing, Ronald MacCumber, and Lynn Egan for the Director of Employment Standards.

OVERVIEW

This is an appeal by Harjinder Gill operating S. & G. Roofing, pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued April 23, 2002. The Director found that Mr. Gill contravened Sections 18, 40(1), 40(2), 44 and 58 of the Act in failing to pay Ronald MacCumber wages, statutory holiday pay and vacation pay, and Ordered that Mr. Gill pay \$3,674.14 in wages and interest to the Director on Mr. MacCumber's behalf.

ISSUE TO BE DECIDED

Mr. Gill's notice of appeal claims there is a factual error, that he was denied an opportunity to respond to the investigation, and that there were facts not considered during the investigation. Although there was no written appeal document, I infer, from the material presented on appeal, that Mr. Gill claims that Mr. MacCumber was paid wages in the amount of \$1,314.74 which were not considered during the investigation. Mr. Gill acknowledged that holiday pay and overtime payments may be owed.

The issue for the Tribunal is whether the delegate erred in concluding that Mr. MacCumber had not been paid the full amount of his wages.

FACTS

Mr. MacCumber worked as a labourer for Mr. Gill's roofing company from November 17, 2001 to January 29, 2002. On February 5, 2002, he filed a complaint with the Employment Standards Branch alleging that he had not been paid wages for all hours he worked.

In the course of investigating the complaint, Mr. Gill confirmed that Mr. MacCumber was on the company payroll and performed work as a labourer. The delegate issued two demands for Employer records, the first on March 5, 2002, the second on April 4, 2002, and received Mr. Gill's commitment to forward them. No documents were ever received, and the delegate found that Mr. Gill declined to participate in the complaint investigation.

Mr. MacCumber provided his record of daily hours worked, and the dates and amounts of wages paid to him. The delegate accepted the information provided by Mr. MacCumber for the purpose of calculating his entitlement to wages as it was the only evidence available, and concluded that Mr. MacCumber was entitled to unpaid wages as noted above.

ARGUMENT

As noted above, Mr. Gill's appeal consists of several documents without any letter indicating how the documents are relevant to the appeal. One of those documents is a May 15, 2002 letter from the delegate

acknowledging receipt of records delivered to the Employment Standards Branch office on November 13, 2002. Those records consisted of three cheques, issued December 1, 2001, January 4, 2002 and January 9, 2002, in the total amount of \$1,314.74. Also included was a payroll deduction statement for "someone named Ronny". The delegate found that no pay statements or T4 had been issued, and no evidence that deductions had been remitted to Revenue Canada on Mr. MacCumber's behalf. She did not accept that those deductions "ought to be added to the net amounts paid in order to determine MacCumber's gross wages paid", and declined to vary the determination.

Included with the appeal documents was an undated T4 issued by 618489 BC Ltd. for "Ron MacCumber" indicating 2001 employment income of \$3,505.00. I infer Mr. Gill relies on this documentation to support his position that the delegate erred in concluding that Mr. MacCumber was owed wages.

After the determination was issued, Mr. Gill provided the delegate with additional information consisting of a record of daily hours worked by Mr. MacCumber during the period November 17, 2001 to January 30, 2002. This record corresponded with Mr. MacCumber's in all respects except that it showed that Mr. MacCumber worked for 4 hours on January 30, 2002. Mr. Gill's records showed wages earned in the amount of \$5,625.51, which corresponds in all respect to Mr. MacCumber's except for the 4 hours of pay for January 30.

Mr. Gill also provided the delegate with statements of wages and deductions that she contends ought not be accepted, since Mr. MacCumber never received a pay statement or a T4.

Mr. Gill also provided the delegate with cancelled cheques that he indicated represented wage payments made to Mr. MacCumber. Although the delegate noted that Mr. MacCumber denied receiving two of them, she concluded, based on a comparison of Mr. MacCumber's signature on the back of all but one of the cheques, that the amount of those cheques (\$2,905.24) should be considered as wages paid. The delegate suggests that the final cheque, which does not bear Mr. MacCumber's signature, ought not be considered when calculating wages owed. Based on the new information, the delegate concluded that Mr. MacCumber was owed \$2,743.71, including interest.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. The delegate, after a review of information provided after the determination was issued, agrees that the Determination should be varied.

Having reviewed all of the evidence and the submissions, I accept that the Determination ought to be varied. However, I will accept that the December 1, 2001 cheque payable to Mr. MacCumber in the amount of \$175.50, which Mr. MacCumber denied receiving, should also be considered wages paid. Notwithstanding Mr. Gill's failure to provide documents on demand, Mr. MacCumber's credibility should have been at issue when he alleged he had not been paid in the face of clear evidence that he had been. The evidence shows that the December cheque that was not endorsed by Mr. MacCumber was deposited to the same bank accounts as the endorsed cheques. On a balance of probabilities, I accept that Mr. MacCumber was paid \$175.50 on December 1, 2001, and that the Determination ought to be further varied in this respect.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated April 23, 2002 be varied as follows: The amount of outstanding wages owed to Ronald MacCumber is \$2,544.77 plus whatever interest might have accrued from February 2, 2002 to the date of issuance of this decision.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal