

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-

Kevin Rice operating as Home Improvements
("Home ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	C. L. Roberts
FILE NO:	98/302
DATE OF DECISION:	July 29, 1998

DECISION

This is a decision based on written submissions by Kevin Rice, owner of Home Improvements, and a written response by the Director's delegate.

OVERVIEW

This is an appeal by Kevin Rice operating as Home Improvements ("Home"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued April 22, 1998. The Director found that Home contravened Sections 17(1), 18(1), 34 and 58(1) of the Act in failing to pay wages, minimum daily pay and vacation pay, and pursuant to Section 28 of the Act, Ordered that Home pay \$1,101.84 to the Director on behalf of Razmak Yakyazarian ("Yakyazarian").

Home concedes that Yakyazarian was not paid minimum daily pay nor vacation pay, and agrees that a total of \$141.0 is due to him. Home denies owing Yakyazarian any other further amounts.

ISSUE TO BE DECIDED

Whether the Director correctly determined that Home owed wages and vacation pay in the amount of \$1,101.84.

FACTS

Yakyazarian filed a complaint with the Director regarding unpaid wages and vacation pay on March 5, 1998. Yakyazarian provided painting services for Home, according to his records, from January 11, 1998 to February 24, 1998

During the investigation of the complaint, the Director's delegate contacted Mr. Rice on April 2, and the parties agreed to meet the following day. Rice did not show up for that meeting, nor did he call to advise he could not attend.

On April 7, the Director's delegate sent a Demand for Records to Home, which was received, as confirmed by Rice's signature, on April 9. Although the letter indicated that the Director would make a determination based on Yakyazarian's information in the absence of any other information provided by Rice, no records were received by the Director's delegate, nor did anyone from Home contact the Director.

The Director's delegate, having no evidence from Home, determined that Yakyazarian was entitled to wages as identified above.

Home's appeal submission included time sheets which indicated that Yakyazarian worked from December 10, 1997 to February 10, 1998. Home contends that its time sheets were maintained on a daily basis by the bookkeeper and are to be preferred over those maintained by Yakyazarian. Home further contends that Yakyazarian was paid in cash on several occasions upon request.

Rice also states that he was unable to keep appointments with the Director's delegate until after the decision was issued, and that had he known that there was a problem, more effort would have been made to attend the meeting.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Section 28 of the *Employment Standards Act* provides that for each employee, the Employer must keep records of a number of matters, including

- (b) the date the employment began
- (d) the hours the employee worked on each day,
- (e) the benefits paid to the employee
- (f) the employees gross and net wages for each pay period, and
- (g) each deduction made from the employee's wages and the reason for it.

Section 85 provides that all records are to be provided to the Director when requested. Failure to comply may result in a \$500.00 penalty per contravention.

Home neglected or refused to provide any records to the Director's delegate when demanded. The Director made a determination based on the evidence provided.

The written appeal submissions suggest that Home's failure to provide the requested information to the Director was due to the busy schedule of the principals involved. Nevertheless, I note that at least one meeting had been agreed to. It was not kept, and no telephone calls were made to the Director to indicate that Rice or any other employee acting for Home could not attend, and reschedule the meeting. None of the information sought was provided until the appeal was filed on May 12, approximately one month after the Determination had been made.

The Demand letter clearly spelled out the date for a response, and the consequences to Home if relevant information was not forthcoming. I am satisfied that letter was received.

Home's failure to reply to a Demand for Records does not constitute a ground for allowing the appeal.

However, even if I am wrong in this determination, I note that the information required to be maintained by the employer under the *Act* has not been maintained. Yakyazarian's evidence, which is supported by independent witnesses, is that no one from Home was at the job site to determine how long he worked, or on what days. Further, Home is unable to satisfactorily establish that any cash payments were made to Yakyazarian, as alleged. Two documents, entitled "Witness to cash payments" were included with the submissions. They contain the following opening sentence "I, , am a witness to cash payments made by Home Improvements in the following amounts".

I do not find this supports Home's position. It does not say to whom the cash was paid, nor include any dates. It would seem prudent to me that an employer paying cash to an employee would obtain a receipt of the payment from the employee to ensure that the records are complete. Home has failed to comply with Section 28 of the *Act* in failing to maintain employee records as required.

Further, as the documentation sought by the Director has only materialized after the Determination has been issued, I am led to infer that it was prepared after that date. Furthermore, it is self supporting. The witness statements were signed on May 15, after the Decision was received.

On a balance of probabilities, I prefer the evidence of Yakyazarian.

Consequently, I deny the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated November 7, 1997 be confirmed, together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Carol Roberts
Adjudicator
Employment Standards Tribunal