

**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-

Vicki Schultz operating Perceptive Construction  
("Perceptive")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	C. L. Roberts
<b>FILE NO:</b>	1999/418
<b>DATE OF DECISION:</b>	September 9, 1999

## DECISION

This appeal was based on written submissions from Vicki Schultz operating Perceptive Construction, Randy Vonk and Lesley Christensen, on behalf of the Director of Employment Standards.

### OVERVIEW

This is an appeal by Vicki Schulz operating Perceptive Construction ("Perceptive"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued June 14, 1999. The Director found that Perceptive had contravened Section 18 of the Act in failing to pay Randy Vonk ("Vonk") and Barry Stadel ("Stadel") wages and vacation pay, and Ordered Perceptive to pay \$1898.70 to the Director on behalf of Vonk and Stadel.

### ISSUE TO BE DECIDED

At issue is whether the Director erred in determining that compensation in lieu of notice was owed to Vonk and Stadel. Perceptive also contends that the interest calculation is in error.

### FACTS

As found by the Director's delegate, the facts are as follows:

Vonk was employed by Perceptive as a carpenter from September to November 7, 1997, earning \$14.00 per hour. Stadel was employed as a labourer from August 1, 1997 to November 7, 1997, earning \$10.00 per hour. Perceptive ceased operations on November 7, 1997.

The Director's delegate made several attempts to contact Perceptive regarding these complaints, without success. The delegate indicated that she left a telephone message on December 6, 1997, sent a letter on December 17, 1997, and issued a Demand for Records on February 17, 1998. As no response was received from Perceptive, the delegate proceeded on the basis of information provided by Vonk and Stadel. Following a review of their evidence, the delegate determined that Vonk was entitled to wages and vacation pay in the amount of \$817.28 plus interest of \$93.42, for a total of \$1010.70, and Stadel was entitled to wages and vacation pay in the amount of \$806.00, plus interest of \$82.09, for a total of \$888.09.

The Director's delegate was unable to conclude that Worker's Compensation Board premiums were deducted from Stadel's wages contrary to Section 21 of the Act, and dismissed his complaint in this respect.

## **ARGUMENT**

The documentation enclosed with the submission discloses that Perceptive, a construction firm, was contracted to perform work for Onni Development (Mulberry) Corp. On November 10, Onni advised Perceptive that it was in default of its contractual obligations, and gave Perceptive five days to correct the default. At a later date, but prior to November 17, the contract was terminated.

As I understand the substance of the appeal submission, Perceptive claims that Vonk and Stadel were self employed sub contractors who paid their own taxes.

Perceptive also claimed that it had a verbal agreement with Onni Development to pay all the sub-contractors directly.

In his submission, Vonk denies Perceptive's claim that he was self employed. He also disputes Perceptive's assertion that Onni was to pay them directly.

## **ANALYSIS**

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am not persuaded that the Director erred.

None of the information provided by Perceptive on appeal was provided to the Director's delegate at the time of the investigation even though it appears that documentation was readily available. Perceptive did not explain why it neglected or refused to respond to any of the delegate's inquiries, or comply with the Demand for Records. The Tribunal has long held that it will not accept evidence at a hearing which ought properly to have been put to the Director's delegate at first instance. (see Kaiser Stables BCESTD# 058/98, and Tri West Tractor Ltd. BDESTC#268/96). Consequently, I would dismiss the appeal for this reason.

However, even if I were to consider the grounds for the appeal, Perceptive has advanced a positions for which no evidence is provided. There is no evidence supporting Perceptive's submission that an oral agreement existed between it and Onni Developments to pay Perceptive's sub contractors directly. Perceptive's documents include a one page memo on Perceptive Construction letterhead, dated November 17, which has the following heading: "This is a list of

the outstanding monies owed by Preceptive (sic) on the Onni site, 7488 Mulberry Place, Burnaby, B.C. which they had agreed to pay at a meeting called by them on Friday November 14, 1997." The list includes Stadel and Vonk's names under the list of Labour sub-contracts. There is nothing confirming Onni's agreement that it would assume any of Perceptive's financial obligations. Furthermore, there is nothing in the evidence provided which establishes to my satisfaction that Vonk and Stadel were self employed sub contractors.

The appeal is dismissed.

**ORDER**

I order, pursuant to Section 115 of the *Act*, that the Determination, dated June 14, 1999 be confirmed, along with any interest accruing since the date of the Determination.

**C. L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**