

An appeal

- by -

Ernst Prohaska operating as Action Exteriors
("Action Exteriors")

- 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: Norma Edelman

FILE No.: 2002/446

DATE OF DECISION: October 8, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") by Ernst Prohaska operating as Action Exteriors ("Action Exteriors") of a Determination that was issued on July 25, 2002 by a delegate of the Director of Employment Standards.

The delegate found that Action Exteriors owed Shadwin Nelson ("Nelson") \$979.01 on account of regular wages and vacation pay. In its appeal, Action Exteriors says the Determination should be cancelled.

This appeal was decided based on the written submissions of the parties. The Appellant's request for an oral hearing is not granted as it failed to participate in the investigation process. The Tribunal will not allow a party to use the appeal process to make the case it should have given to the delegate during the investigation process.

ISSUE TO BE DECIDED

Does Action Exteriors owe Nelson regular wages and vacation pay?

FACTS AND ANALYSIS

Nelson worked for Action Exteriors from May 8, 2002 to May 23, 2002 as a labourer.

After quitting his job, Nelson filed a complaint at the Employment Standards Branch alleging he was owed wages by Action Exteriors. Nelson claimed he was owed wages for 110 hours of work @ \$8.50 per hour, plus vacation pay on that amount.

In the Determination, the delegate said he sent a letter to Action Exteriors about Nelson's complaint and asked it to provide a response. When no reply was received, he sent another letter to Action Exteriors and he also tried to contact the employer by phone on several occasions but his calls were never returned. As a result, the delegate accepted Nelson's position, which included a record of hours, and he concluded that Nelson was owed wages in the amount of \$979.01 including interest.

Ernst Prohaska ("Prohaska") filed an appeal on behalf of Action Exteriors on August 19, 2002. He says there are facts that were not considered during the investigation and he was denied the opportunity to respond to the investigation. He also says as follows:

He (Nelson) has a problem with me and my son and he is trying to get more money than he should get. He didn't even work enough hrs. to make that much in the first place cause it was \$8.00 an hr. on contract piece work.

Prohaska wants the Tribunal to cancel the Determination and he wants an oral hearing so he can make his "statements of proof" that he paid Nelson, who is homeless and is trying to "scam (him) for more money".

The delegate and Nelson were invited to reply to the appeal. Only the delegate replied and he says that the appeal should be dismissed because Action Exteriors failed to participate in the investigation. He cites Tribunal Decision *Tri-West Tractor Ltd.* BC EST #D268/96 in support of this position. He also says Action Exteriors has not provided any evidence to support the conclusion that Nelson has been paid all his earned wages.

Action Exteriors was given an opportunity to make a final reply. It did not do so.

The burden is on the Appellant, Action Exteriors, to show that the Determination is wrong. I am not satisfied that Action Exteriors has met that burden.

The Tribunal has consistently held that in the absence of a legitimate reason, evidence and information will not be considered on appeal when it could have and should have been presented to the delegate during the investigation process (see *Specialty Motor Cars* BC EST #D570/98). An appeal is not a complete re-examination of the complaint and the Tribunal will not allow the appeal process to be used to make the case that should have been given to the delegate during the investigation process.

In this case, Action Exteriors claims it was denied the opportunity to respond during the investigation. However, there is absolutely no evidence to support that claim. Rather, the information provided by the delegate, which was not specifically challenged by the Appellant, clearly shows that Action Exteriors failed to participate in the investigation process. Further, Action Exteriors provides no reason, let alone a legitimate reason, why it did not respond to the delegate. For that reason alone, the appeal is dismissed. The information provided by Action Exteriors on the appeal could have and should have been presented to the delegate in the initial investigation.

However, even if I consider Action Exterior's reasons for the appeal, the appeal is still not successful.

Action Exteriors provides no proof whatsoever, such as pay stubs or other payroll records, to show Nelson was paid. Accordingly, based on the material before me, I am satisfied that Action Exteriors owes Nelson wages in the amount of \$ 979.01

ORDER

I order pursuant to Section 115 of the Act that the Determination is confirmed.

Norma Edelman
Vice-Chair
Employment Standards Tribunal