

An appeal

- by -

Kirk Arsenault

- 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.: 2002/488

DATE OF DECISION: November 12, 2002

DECISION

This decision is based on written submissions by Kirk Arsenault, Paul Pulver, Schiller Coutts Weiler & Gibson, Barristers and Solicitors, on behalf of Seal Tec Industries Ltd., and Stephanie Newman, a delegate of the Director of Employment Standards.

OVERVIEW

This is an appeal by Kirk Arsenault, pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued August 29, 2002. Mr. Arsenault alleged that he was owed wages in the amount of \$7,681.86 in accordance with a profit sharing arrangement he had with his employer, Seal Tec Industries Ltd. ("Seal Tec"). The Director's delegate concluded that Seal Tec had not contravened the Act, that Mr. Arsenault was not owed any wages, and closed the file.

ISSUE TO BE DECIDED

Whether the Director's delegate erred in concluding that Mr. Arsenault was not entitled to wages.

FACTS

Mr. Arsenault worked as a sales employee for Seal Tec, a pavement maintenance and construction services business, from April 2001 to October 31, 2001.

The parties did not dispute that they had an agreement in which Seal Tec agreed to provide Mr. Arsenault with 1/3 of the net profits from the commercial division. The parties disagreed however, on the definition of "net profit" and how that was to be calculated.

The agreement did not define "net profits", or how the overhead and other expenses were to be allocated to each division.

Seal Tec's position is that "net profits" meant the profits remaining after taxes, depreciation, re-investment into the company, and expenses. The amount allocated to taxes, depreciation, re-investment and expenses was to be determined by Seal Tec in accordance with Generally Accepted Accounting Principles (GAAP) and relevant taxation authorities. Seal Tech contended that the commercial division did not have any net profits to divide with Mr. Arsenault in 2001. Seal Tec provided copies of profit/loss statements, prepared by an outside accountant using GAPP to the delegate, in support of its position.

Mr. Arsenault's position is that the determination of "net profits" was "up for debate", but generally meant the profits after expenses were deducted from income. His position was that net profits were to be determined by dividing overhead expenses for each of Seal Tec's divisions proportionally, based on each division's gross profits. Mr. Arsenault alleged that Seal Tec failed to allocate the expenses proportionally so that the commercial division did not show a profit. Mr. Arsenault also contended that Seal Tec falsified the profits and expenses attributed to the commercial crack sealing division. He sought to have the delegate perform a forensic accounting of Seal Tech's expenses to ascertain their legitimacy.

The delegate found no evidence to support Mr. Arsenault's definition of net profit, or any evidence to support his allegation that Seal Tec falsified the profits and losses attributed to the commercial crack sealing division.

ARGUMENT

Mr. Arsenault argues that he would not have entered into an agreement in which one third of Seal Tech's overhead would be allocated to the commercial division, which included crack sealing and seal coating. Mr. Arsenault contends there was a verbal agreement to share the profits of the commercial crack sealing, seal coating and paving divisions of Seal Tec, not just the crack sealing division.

Mr. Arsenault also contends that the investigation of his complaint was unfair, as he was not given an adequate opportunity to respond to Seal Tec's position.

Seal Tec argues that Mr. Arsenault's appeal discloses no grounds of appeal, and, despite his allegation that the determination contains errors in fact, his appeal documents do not indicate what those errors are. It contends that Mr. Arsenault's appeal merely repeats the facts and evidence provided to the delegate.

While the delegate concedes that the profit share agreement was for a share of the net profits for the entire commercial division (including crack sealing, seal coating and paving divisions), she contends that the Determination should be upheld. She argues that, in the absence of any clear agreement of what constitutes "net profits", an essential term of the agreement, no error has been demonstrated.

The delegate argues that Mr. Arsenault was given full opportunity to respond to Seal Tec's position. She states that she forwarded Seal Tec's January 11 documents to Mr. Arsenault, and that he replied to them on February 8, and that, on June 14, she discussed with Mr. Arsenault additional information Seal Tec provided to her on May 3. She notes that she offered to provide Mr. Arsenault with Seal Tec's documents, and that he declined the offer.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the delegate erred.

Mr. Arsenault's argument on appeal is the same as was made to the delegate. Mr. Arsenault is unhappy that the delegate did not accept his definition of "net profit". However, Mr. Arsenault provided no evidence to support his argument. It is clear Mr. Arsenault has the burden of substantiating his position in the absence of an agreement in writing, particularly when there are generally accepted accounting definitions of net profit. In order to establish his claim, Mr. Arsenault must demonstrate that the parties had a "meeting of the minds" on the definition, which is fundamental to the agreement. Mr. Arsenault may have believed that "net profits" had a certain meaning, but unless Seal Tec also had that same understanding, there was no meeting of the minds, and thus no agreement. It is not enough for Mr. Arsenault to say that he would never enter into a particular type of agreement. Mr. Arsenault failed to convince the delegate there was such an agreement.

An appeal is not an opportunity to re-argue a case. Mr. Arsenault presents no new evidence to support his position. Without documentary or other corroborative evidence supporting his position, Mr. Arsenault's appeal cannot succeed.

Mr. Arsenault also contends that he had no opportunity to respond to the investigation, or present his case adequately. I am not persuaded this is the case. This was Mr. Arsenault's complaint. He was to provide the delegate with all relevant information supporting his position. The delegate says that she disclosed Seal Tec's position to Mr. Arsenault at all times, and noted Mr. Arsenault's response. However, even had the delegate not fully disclosed Seal Tec's position to Mr. Arsenault at the investigative stage, it was fully outlined in the Determination.

An appeal has the function of curing any defects that might have occurred at the investigative stage. Mr. Arsenault has had full opportunity on appeal to respond to Seal Tec's position. He has not done so in any substantive way. Given that Mr. Arsenault does not present any new arguments after having seen Seal Tec's position, I take it he has none, and am not inclined to conclude that he has not had a fair opportunity to respond.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated August 29, 2002, be confirmed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal