

An appeal

- by -

Karen Terrilon operating as ABC Coast Independent Flagging
("Terrilon" or "employer")

- 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: Paul E. Love

FILE No.: 2001/311

DATE OF DECISION: September 19, 2001

DECISION

OVERVIEW

This is an appeal by an employer, Karen Terrilon operating as ABC Coast Independent Flagging, from a Determination dated March 27, 2001 issued by a Delegate of the Director of Employment Standards, pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”). In this Determination the Delegate found that Patricia Dyck and Scott T. Mudrey were employees, and entitled to wages. In a separate Determination issued concurrently with this Determination, the Delegate imposed a penalty under s. 46 of the *Employment Standards Regulation, (“Regulation”)* for the Employer’s failure to provide documents, including payroll documents, demanded by the Delegate. The Director imposed liability on the basis of the Employee’s evidence. The Employer appealed on the basis that the Delegate did not permit it an opportunity to participate in the investigation, and the Delegate decided the case only on the basis of employee records. In an investigation under the *Act*, the Delegate must give the Employer a reasonable opportunity to participate in an investigation. Where the Employer refuses to provide documents and information, the Delegate can proceed to determine the matter on the basis of the information before the Delegate. If the Delegate can find facts on the basis of information and documents submitted by the Employees, the Delegate can proceed to issue the Determination.

ISSUE:

Did the Delegate err in issuing the Determination on the basis of the information provided by the employees, in the circumstances of this case?

FACTS

Patricia Dyck and Scott T. Mudrey (“the complainants”) alleged that they worked for Karen Terrilon operating as ABC Coast Independent Flagging for the period July 17 to July 27, 2000 as flaggers, at a rate of \$7.15 per hour. The Determination was issued on the basis of information obtained from the employees only. Terrillon alleged that she was not the employer of these complainants. In a later submission to the Tribunal, Terrillon alleged that Dyck and Mudrey were independent contractors. Terrillon refused to provide employment records sought by the Delegate. The Director imposed a \$500.00 penalty for the employer’s refusal to comply with the demand. My reasons with regard to the appeal concerning the penalty Determination were issued concurrently with the reasons in this appeal, under a separate Decision.

The Employer’s appeal was based on the argument that the Delegate considered only the evidence of the employees and failed to review documents, or witnesses provided by the Employer. No particulars with regard to the employer’s information are set out. The Determination does set out the employer’s view that the complaint made by the Employees is a

“hoax”. The Delegate, however, rejected this position in light of the detailed complaints supplied by the complainants, and the small amount claimed by the Employees.

The Employer complains that it was not given adequate particulars of the complaint made, and in particular was not provided with invoices from the employees which set out the dates worked. The Employer was concerned that the Employees had no particularized the precise location or dates of the work, so that it would be expensive, time consuming and unfair for Terrilon to respond to the complaints. The Employer indicated her willingness to cooperate in the investigation once the Delegate provided the “details of the complaints”.

By letter dated February 20, 2001 the Delegate wrote to the employer as follows:

You have been provided with all the details of the complaints that have been filed. Your continued refusal to provide me with the information that I requested in my letter of November 8, 2000 is impeding the investigation that I am required to conduct. Since you have declined to provide me with the names addresses and telephone numbers of persons working for you on Francis Peninsula, the name of the contractor for whom the work was performed or the name of the Ministry of Highways contact for that site for July 2000, the purpose of my visit is to examine your records to obtain that information.

Please contact me immediately on receipt of this letter and no later than **March 1, 2001**. If I do not hear from you by that date, I will issue a Determination based on the information that has been provided to date. Please be aware that your refusal to provide information to the Delegate of the Director, during the course of the investigation may seriously compromise any appeal rights if a Determination is not favourable to you. Please also note that failure to produce records may lead to penalties.

The evidence before the Delegate, submitted by the employees, indicated that Mudrey was entitled to payment for 22 hours pay, and Dyck 27.5 hours at straight time and 1.25 hours at time and a half, and 1 hour daily minimum pay. The Delegate found that Mudrey was entitled to \$165.15 and Dyck entitled to \$223.33, inclusive of interest.

In the materials before me, was a letter authored by Terrilon indicating that she had previous dealings with the Delegate, and that on the last investigation the employer’s business manager spent more than 300 hours in the investigation of a complaint, over a year time period, the Determination of which was overturned by the Tribunal on appeal. The Employer made the point that she could not afford to be subjected to another investigation like the previous one.

Employer's Argument:

The Employer alleges that the Delegate did not provide particulars sufficient for her to respond to the complaint. The Employer alleges that the Delegate decided the case on the basis of the information presented by the Employees. She seeks that the Determination be set aside, and referred for investigation to a different investigator.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case the Employer, to show that there was an error in the Determination such that I should vary or cancel the Determination.

The Delegate commenced an investigation. The Employer denied that the complainants were employees. Pursuant to s. 85(1) (f) the Delegate has the power to make a demand for records “for the purpose of ensuring compliance with the Act”. The only limitation is that the records sought be relevant to an investigation under this Part. The Employer refused to participate in the investigation. The Delegate therefore determined the complaint upon the available information, which was information provided by the complainants.

A person who fails to cooperate in the investigation of an employment standards complaint does so at her peril. The Delegate performs an investigatory role, and has extensive powers to obtain documents and other information. A Delegate has to afford the employer a reasonable opportunity to participate in the investigation as set out in s. 77 of the *Act*. In this case the Delegate attempted to obtain information and records from an employer, who denied that the complainants were employees, but who refused access or delivery of documents to the Delegate. The Delegate did afford a reasonable opportunity to the employer to participate in the investigation.

A Delegate also performs an adjudicative or decision making function. The Delegate should have regard to the information before her in making a decision. There was sufficient information before the Delegate to support the finding that Terrilon was the employer, and that the employees were entitled to wages in the amount set out in the Determination. This Tribunal has noted, repeatedly, that the time for the Employer to present facts and information is at the time of the investigation. If the Employer fails to participate in that investigation, the Employer will have substantial difficulty in convincing the Tribunal that the Determination should be set aside on the basis that the Delegate considered “only the employees’ information”.

For all the above reasons I find that the employer has not shown any error in the Determination.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated March 27, 2001 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal