

An appeal

- by -

Richard Eubank operating as Enerhome Residential Contracting
("Eubank" 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.: 2002/467

DATE OF DECISION: November 21, 2002

DECISION

OVERVIEW

This is an appeal by an employer, Richard Eubank, doing business as Enerhome Residential Contracting (“Eubank” or “Employer”), from a Determination dated August 21, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”). The Employer failed to provide information to the Delegate, and failed to respond to a demand for records. The Delegate determined the case upon evidence presented by the Employee including a calendar kept by the Employee. The Employer alleged that the Delegate erred in finding the facts. The Employer provided handwritten statements to the Tribunal which were not provided to the Delegate, however, the Employer did not provide any business records indicating the wage rate or the hours worked. A party who fails or neglects to participate in an investigation, may have some difficulty in satisfying the Tribunal of an error made by the Delegate in finding facts. This Employer has not demonstrated any error that the Delegate made either in the calculations, or in relying on material supplied by the Employee. I therefore dismissed this appeal, and confirmed the Determination.

ISSUES:

Did the Delegate err in the factual findings in this case?

FACTS

I decided this case after considering the written submission of the Employer, Employee and the Delegate.

Matthew Touchie (the “Employee”) worked as a carpenter for Richard Eubank operating as Enerhome Residential Contracting. He was employed as a contractor between May 13, 2002 to July 10, 2002. The Delegate determined the facts in this case solely on the basis of evidence provided by the Employee, including an employee provided calendar setting out hours worked. The Delegate found that the Employee’s rate of pay was \$16.00 per hour, and that the employee earned \$4112.42 between May 13, 2002 and July 10, 2002, and was entitled to 4 \$ vacation pay in the amount of \$164.49.

In the Determination the Delegate indicated that:

The employer agrees that he owes wages to this employee, but has a cashflow problem, and is unable to pay. He disagrees with Matthew Touchie’s hours, and his rate of pay. He did not however, respond to a Demand for Employer Records, sent to his home by registered mail on July 29, 2002.

It appears that the Delegate spoke to the Employer by telephone on July 29, 2002, the day she sent the Demand for records. The Employer was aware from a telephone conversation that records were required and promised to provide records. The Delegate did not receive any records from the Employer. The Delegate issued the Determination on August 21, 2002 after the Employer did not send any records to the Delegate. It appears from the Delegate’s submission that the Demand was sent on July 30, 2002, and that a card was left to advise the Employer of the envelope on July 30, 2002 and to inform the Employer to

pickup the item at the local Canada Post Corporation outlet. On September 6, 2002 the item was refused. On September 9, 2002 the item was successfully delivered.

Employer's Argument:

The Employer argues that the Employee lied to the Delegate about the hours worked, and his hourly rate. The Employer submits that the Employee never stayed for a full shift, except for 8 days, and that the Employee left for appointments with someone. The Employer alleges that the Employee had a "drinking problem". The Employer submits:

Obviously there is an error in facts and factors which were not considered in investigation. I had received Mr. Touchies (sic) fictitious claim for hrs on the 19/Aug/2002.

The Employer also submits that he had past difficulties with the Delegate, and that he was slow in responding to the Delegate's investigation because of chronic pain arising from a 1999 motor vehicle accident.

Employee's Arguments:

The Employee submits that he is being "slandered" by the Employer. The Employee submits, that he never received a record of employment. While he is prepared to settle for less than the amount set out in the Determination, the Employer has not accepted the offer contained in his submission to the Tribunal.

Delegate's Argument

The Delegate says that she provided an ample opportunity to participate in the investigation, and the Employer failed to respond to a demand for documents. The Delegate provided details related to her dealings with the Employer, which are set out in the findings of fact, above. She submits that the Determination should be confirmed.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

The Tribunal is a forum for correcting errors that were made by a Delegate during an investigation. It is not a forum for presenting one's case for the first time.

This appeal is entirely based on errors that the Employer alleged occurred during an investigation by the Delegate, in which the Employer neglected or failed to participate in. The Employer did not submit any records to the Delegate, and the Employer did not submit any business records to the Tribunal with regard to wage rates or hours worked. This Tribunal has written on many occasions that the failure of an Employer to participate in an investigation by supplying information and documents, is generally fatal to an appeal alleging that the Delegate erred in the fact finding process: *Tri-West Tractors Ltd.*, BCEST #D 286/96.

After the filing of the appeal, the Employer filed further handwritten statements from himself, and three other persons. This evidence was not produced to the Delegate. I decline to consider this new information, as it should have been produced to the Delegate. An Employer who fails to participate in an investigation does so at its peril. This Employer has not demonstrated any error that the Delegate made either in the calculations, or in relying on material supplied by the Employee. I dismiss this appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated August 21, 2002 is confirmed

Paul E. Love
Adjudicator
Employment Standards Tribunal