

An appeal

- by -

Robert Hazlett operating as Robert Hazlett Construction

- 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: John M. Orr

FILE No.: 2002/497

DATE OF DECISION: December 2, 2002

DECISION

OVERVIEW

This is an appeal by Robert Hazlett operating as Robert Hazlett Construction (“Hazlett”) pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination dated September 3, 2002 by the Director of Employment Standards (the "Director").

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

The Director determined that Hazlett had failed to pay wages to two employees who had worked for Hazlett on a construction project. Hazlett appeals from the determination on three grounds. Firstly, Hazlett submits that the hours of work claimed by the two employees was not accurate. Secondly, he had an agreement with the employees to pay them by instalments and thirdly, that the men were in fact sub-contractors and not employees.

ISSUES

The issues that arise are set out in the appeal and are whether the hours of work allowed by the Director's delegate were correct. Secondly, what is the effect of an agreement with the employees to pay them by instalments and thirdly, whether Hazlett has established that the men were in fact sub-contractors and not employees.

ANALYSIS

The onus on an appeal of this nature is on the appellant to satisfy the Tribunal that the determination is wrong and should be cancelled, varied or referred back to the Director. While Hazlett alleges that the hours of work claimed by the workers does not match his own records the Director's delegate points out, and it is noted in the determination itself, that the calculation of wages owed was based on the employer's own records and the difference in amount owing is due to overtime wages and vacation pay being calculated. As a result I am not satisfied that the calculations should be varied.

Hazlett alleges that he entered into an agreement with the workers to pay them the money owed to them in monthly instalments. However the *Act* requires that wages be paid when due and Section 4 of the *Act* provides that such requirements cannot be waived and any agreement to waive such requirements is of no effect. Therefore, even if there was such an agreement it would be of no effect and this ground of appeal fails.

Hazlett alleges that the workers were sub-contractors and not employees. However Hazlett provides no evidence to support this bare allegation. The Director's delegate points out that the workers were under the control of Hazlett and were not in a position to have the chance of profit or risk of loss on their own behalf. While the workers owned their own hand tools this is normal in the construction industry. There simply is no evidence to support the allegation that the workers were independent contractors and the

onus is on the appellant to provide an evidentiary base to support the allegation. I am not satisfied that the appellant has met this onus and therefore this ground of appeal must also fail.

In conclusion, I am satisfied that the Director's delegate was correct in concluding that the workers were employees and in calculating the amount of wages outstanding. The alleged agreement for instalment payments is of no force and effect. Therefore, the determination will be confirmed.

ORDER

I order, under section 115 of the *Act*, that the determination dated September 3, 2002 is confirmed together with any further interest that may have accrued since that time.

John M. Orr
Adjudicator
Employment Standards Tribunal