

An appeal

- by -

Ray Izony operating Gattah Contracting
(“Izony”)

- 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: Wayne R. Carkner

FILE No.: 2001/492

DATE OF HEARING: September 19, 2001

DATE OF DECISION: October 17, 2001

DECISION

APPEARANCES:

For the Appellant	Lorna Wandio – Representing Izony Sherry Izony
For the Respondent	No Appearances
For the Director	No Appearances

OVERVIEW

This is an appeal by Ray Izony, operating Gattah Contracting, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by the Director of Employment Standards (the “Director”) on June 8, 2001. The Determination concluded that the Appellant had contravened Sections 16, 17, 18, 21, 22, 27 & 28 as well as failing to comply with all of the requirements of the *Act* and the *Employment Standards Regulation* (the “*Regulation*”). The Determination concluded that the Respondent was entitled to a remedy of \$841.77 comprised of \$549.25 for wages owing, \$247.00 for wages deducted for goods that were to be provided by the Appellant and were not and \$45.52 for interest pursuant to Section 88 of the *Act*. The appeal was adjudicated by way of an oral hearing and written submissions from the Appellant and the Director.

ISSUES

1. Did the Appellant fail to participate in the investigation and therefore be excluded from presenting any evidence that they could have presented to the Director during the course of the investigation.
2. If the Appellant’s evidence is allowed, is there an error in facts and facts that that were not considered that would be fatal to the conclusions reached in the Determination.

FACTS AND ARGUMENT

The Appellant operates a silviculture business that falls under the jurisdiction of the *Act*. The Respondent worked as a Labourer from August 10, 2000 to August 27, 2000. The Respondent received a one-time cash payment of \$700.00 from the Appellant. The Appellant was paid by the Respondent \$147.00 for a power saw bar, a power saw chain and work boots. The Appellant did not provide these items to the Respondent after payment was made.

In the appeal submissions the Appellant provided numerous documents asserting that the Respondent had charges to the commissary at the work site that were paid by the Appellant and that the net result was that the Respondent had been over paid by \$342.49. Based on these facts the Appellant submits that the Determination should be canceled.

The Director submitted written submissions outlining the attempts made by the Director to contact the Appellant during the investigation process and the difficulties in doing so.

- The Director attempted to contact the Appellant by mail that was sent on March 16, March 27 & April 10, 2001.
- The Director received no responses from the Appellant until a facsimile was received on April 19, 2001. The content of the handwritten facsimile was:

“

April 19/01

RE: Trevis Larocque and Guttah Contracting

Attention Hans Suhr:

Dear Mr. Suhr, I have just been made aware of this matter and I have contacted Gattah Contracting bookkeeper, she has asked that I write you a brief letter stating that she will be returning to P.G. on the 6th of May and this matter will be taken care of then. Sorry for any inconvenience.

Thank You

Mrs. Izony”

- The cover page of the facsimile provided a telephone number for Gattah Contracting but did not contain an address.
- The Director then, after having not been contacted by the Appellant, attempted to contact the Appellant via the telephone number provided on the facsimile. These attempts were made on May 10, 2001 and on May 22, 2001 and messages were left with the person who answered the telephone.
- The Director then sent a letter on May 23, 2001 requesting that the Appellant contact the Director by June 4, 2001.
- There was no response from the Appellant by June 7, 2001.
- The Determination was then issued on June 8, 2001 based on the information provided by the Appellant.

- The Determination was mailed to the appellant and returned to the Director on June 12.
- The Director then used the facsimile number provided in the April 19, 2001 facsimile to deliver the Determination to the Appellant.

Based on the foregoing the Director submits that the appeal should be dismissed as the Appellant refused to participate in the investigation and that the Determination should be confirmed.

At the commencement of the hearing it was identified to the Appellant that as per the Director's submission, dated July 25, 2001, there was a preliminary issue to be dealt with.

Lorna Wandio, the Appellant's bookkeeper (the Bookkeeper), was representing the Appellant. She identified that the Appellant had not received the Director's submission and would require an adjournment to prepare a response. The bookkeeper affirmed that all the documents that were presented in the appeal submission were accurate and that the Respondent was indeed overpaid as outlined in the submission.

Sherry Izony acknowledged that she had sent the facsimile dated April 19/01 and that when she became aware of the complaint, though she could not identify how she became aware of the complaint; she contacted the bookkeeper and was asked to send the April 19/01 facsimile identifying the date that the Director would be contacted by the bookkeeper. When asked why she (Sherry Izony) did not follow up to ensure that the Director had been contacted she stated that as it had been turned over to the bookkeeper she did not think that her further involvement was required.

I inquired of the Bookkeeper as to why she did not contact the Director between May 6, 2001 and June 8, 2001, the date the determination was issued. The Bookkeeper replied that it was a busy time of year, tax time, and that she was working in Vancouver. The Bookkeeper asserted that she had never even heard of the term "Determination" and that, as she was busy and didn't think the issue was very important, that the contact could wait until her return from Vancouver. The Bookkeeper returned to Prince George on June 6, 2001. The Bookkeeper stated that as soon as she became aware of the Determination she contacted the Director and provided information to the Director later in June 2001. This concurs with the Director's submission that identified the date as June 21, 2001. The Bookkeeper stated that she was not aware of the letters or phone calls that were identified in the Director's submission.

Both Sherry Izony and the Bookkeeper stated that they were not aware of the requirements of the *Act*.

I provided the Appellant with a copy of the Director's submission as well as some letters on the file that the Appellant asserted had not been received.

I granted an adjournment to allow the Appellant to properly prepare a reply to the Director's Submission.

After the adjournment I contacted the Tribunal's administrative offices and confirmed that the Tribunal's correspondence may have been sent to the wrong address. The Tribunal was instructed to send a letter to the Appellant, at the address provided at the hearing, informing the Appellant that I would receive submissions of reply to the Director's submissions until October 5, 2001. I have now received those submissions and will now comment on them.

The Appellants written submission identifies that it failed to receive any of the correspondence, except the documents provided by myself on September 19, 2001, that is outlined in the Director's submission with the exception of the Determination that was received by facsimile on June 14, 2001. The Appellant submitted that the Bookkeeper contacted the Director on June 6, 2001 however at the hearing the Bookkeeper stated that the Director was contacted after the Determination was received by facsimile. I find this contradiction in statements troubling and accept the statement provided by the Bookkeeper at the hearing.

The Appellant asserts that the Director did not try hard enough to contact the Appellant and based on this the evidence provided by the Appellant should be accepted.

The Appellant also submits that the Tribunal did not provide enough information to assist the Appellant to prepare for the appeal.

Further the Appellant also submits that the terminology utilized in the hearing was foreign to them.

The Appellant submits that the evidence provided by the Appellant should be accepted in this appeal and that as a result of this evidence the Determination should be canceled.

ANALYSIS AND CONCLUSIONS

Dealing with the terminology used in the hearing, lay terms were utilized and, where any confusion arose with the Appellant, the terminology and process were explained in detail.

The Tribunal makes every attempt to outline the requirements of an appeal and the process of appeal and are provided with the contact numbers of the Tribunal to request assistance. Attached to each Determination is a notice, which contains the information that the Determination can be appealed, the date the appeal must be filed by, and the contact numbers of the Tribunal. The notice also identifies a booklet, The Guide to the Appeal Process, and identifies that this booklet is available at the Employment Standards Office. The Appellant's last submission clearly outlines that they were in contact with the Tribunal and that the Tribunal provided assistance.

The Appellant asserts that the Director did not try hard enough to contact the Appellant. After reviewing the Director's submission it is obvious that the Director exerted considerable effort to contact the Appellant and was finally successful in this endeavour (See the facsimile from Appellant dated April 19/01). It was the Appellant that failed to follow up on the commitment of having the Bookkeeper contact the Director on or about May 6, 2001.

I further commend the Director for making several more attempts to contact the Appellant prior to issuing the Determination.

I also find troubling the statement that the Appellant became aware of the complaint but couldn't identify how this occurred. I can only conclude from this that one of the attempts of the Director to contact the Appellant was successful.

The Bookkeeper stated that she didn't think the issue was very important. Apparently she thought it was important enough to have the Appellant send a facsimile on April 19/01 to the Director making the commitment that the Bookkeeper would contact the Director on or about May 6, 2001.

Neither the Appellant nor the Bookkeeper have provided any reason as to why they did not contact the Director between May 6, 2001 and the date the Determination was issued other than "the Bookkeeper was busy". This reason is unacceptable.

The Appellant and the Bookkeeper stated that they were unaware of their requirements and obligations under the *Act*. This does not disavow them of their statutory obligations under the *Act* and *Regulation*. Employers and their representatives have a duty to be aware of these obligations and to comply with these obligations. Ignorance of the statute does not constitute an acceptable defense.

For the foregoing reasons I must conclude that the Appellant chose not to participate in the investigation of the Respondent's complaint and therefore the evidence proffered in the appeal submissions is disallowed.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 8, 2001 be confirmed in the amount of \$841.77 along with any accrued interest pursuant to Section 88 of the *Act*.

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal