

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Red Rose Furniture Gallery Ltd.
("Red Rose")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: W. Grant Sheard

FILE No.: 2000/630

DATE OF DECISION: December 19, 2000

DECISION

SUBMISSIONS:

Rand L. Buckley, Counsel on behalf of the Employer

Sharon A. Charboneau on behalf of the Director

OVERVIEW

This is an appeal by Red Rose Furniture Gallery Ltd. and Red Rose Furniture Wholesale Ltd., pursuant to Section 112 of the Employment Standards Act (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on August 21, 2000. In this appeal the employer claims that Ashok Bali is not an employee such that no wages are due and owing to him or in the alternative, even if he was an employee there are still no wages due and owing to him.

ISSUE

1. What use can be made of new evidence presented for the first time by Red Rose at this appeal?
2. Whether Ashok Bali was employed by Red Rose, and if he was, whether there are any outstanding wages due and owing to him.

FACTS

Red Rose Furniture Gallery Ltd. operates a furniture wholesale outlet at 1790 Kingsway Avenue in Vancouver and Red Rose Furniture Wholesale Ltd. operates a wholesale furniture outlet at 104, 8318 – 120th Street in Surrey. Both corporations are under common control and direction and are referred to herein as “Red Rose”. The Complainant, Ashok Bali (“Bali”) claimed in his submissions to the Director’s delegate that he was employed by Red Rose as a delivery driver, driving Red Rose’s truck, at an agreed rate of \$9.50 per hour for the period January 12 to March 7, 2000 and that he was forced to quit when Red Rose failed to pay him as agreed.

In the determination dated August 21, 2000 the Director’s delegate found that Red Rose was an employer of Bali. Further, she determined that the Act had been contravened and that Red Rose owed \$4,034.64 to Bali for unpaid wages, including holiday pay and interest.

In her determination, the Director’s delegate said as follows:

“During a complaint investigation, the onus is primarily on the employer to raise doubts in the Delegate’s mind as to the validity of the complaint. The Act requires employers to keep proper records and to cooperate with an investigation under the Act, even when they are arguing that they are not an employer....

In this particular investigation, the alleged employer maintained that he had the evidence but failed to provide any of the particulars to the Delegate. He was provided with reasonable opportunity to respond to the allegations against him during the period April 27 to date, per Section 77 of the Act, however he chose to frustrate the investigation by failing to provide the information he claimed to have in his possession.”

Red Rose's Position

In written submissions dated September 13, 2000, Mr. Buckley argued on behalf of Red Rose that Mr. Bali was never an employee of Red Rose, but that he was an independent contractor under one contract to provide cleaning services for the sum of \$1,600.00 and under another separate contract to perform occasional deliveries at the rate of \$25.00 per delivery. Mr. Buckley further submitted that Bali was paid \$2,000.00 by Red Rose under those contracts and, as such, was paid in full as agreed. Mr. Buckley submitted that the Determination should be set aside and the appeal allowed.

In a second submission dated October 13, 2000 Mr. Buckley provided an undated handwritten note from Mr. M. Khan on Red Rose letterhead stating that he repaired furniture for Red Rose and was paid \$100.00 for the month of February 2000.

In his third submission of November 14, 2000, Mr. Buckley submitted that Red Rose's tardiness in failing to provide records requested by the Delegate should not prevent the reception of such evidence on appeal and that the evidence should be given full weight.

Bali's Position

Ashok Bali did not file or make any submissions on this appeal.

Director's Position

The Director noted that the investigation of this complaint began on April 27, 2000 and ended on August 21, 2000 with Red Rose failing to provide documentary evidence that is now submitted for the first time on this appeal. The Director submits the Red Rose was advised of the complaint by the delegate in a letter dated April 27, 2000 and given a Demand for records to be responded to by May 8, 2000. Further, the delegate wrote letters to Red Rose on May 30, 2000 and June 7, 2000 inviting Red Rose to submit the evidence that Red Rose claimed (in faxed responses to those letters) to have. However, this evidence was never provided to the delegate. The Director submits that Red Rose should not be permitted to “lie in the weeds” by merely referring to evidence without producing such evidence. In effect the Director submits that the new evidence presented by Red Rose for the first time on this appeal should not be considered, that the appeal should be dismissed and the Determination confirmed.

ANALYSIS

1. Use of New Evidence

The issue of the use of new evidence at appeal which was not presented to the Delegate at the investigation of the complaint has been considered several times by this Tribunal. Indeed, in the case of *Specialty Motor Cars (1970) Ltd.*, BC EST #D570/98 there is reference to the “Tri-West/Kaiser Stables Rule”. This issue was decided in *Tri-West Tractor Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97. In *Tri-West (supra)*, the adjudicator there held evidence inadmissible because:

“This Tribunal will not allow appellants to ‘sit in the weeds’, failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it...The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.”

Notwithstanding this exclusionary rule, the adjudicator in *Specialty Motors (supra)* held as follows:

“However, it should also be recognized that the *Kaiser Stables* principal relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigation officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria.”

In the present case therefore, in addition to the failure to disclose the evidence at the investigative stage, the admissibility of this evidence also turns on other factors such as the importance of the evidence, the reason it was not disclosed and any prejudice to the parties from non-disclosure.

I find that the evidence is not important in that it is of little assistance. The statements from *Karan Drywall & Taping Ltd.* and *Dhinjal Enterprises* purportedly confirm that Bali performed cleaning services and removal of garbage only. They speak to the nature of the work performed. There is no suggestion they were present when the contract was entered into or otherwise privy to its terms. The list of purchases of Red Rose (and deliveries) again relates to the nature of the work performed not the terms of the contract. The employment records relating to other employees and the letter of Mr. Khan similarly do not assist.

I also find that no good reason has been advanced for the failure to produce these documents at the investigative stage. Although the delegate was advised in a fax of the existence of witnesses, she was not given any details of who they were so that she could contact them. Although Bali and the Director may not be prejudiced in the sense that they could respond to this material in written submissions in this appeal, there is a general prejudice is not having the opportunity to respond to and investigate this material to resolve the matter at the earliest opportunity.

I find that the new material filed ought not to be allowed in deciding this appeal. Red Rose's failure to participate at the investigation stage is significant, however, the Determination must still be examined and the submissions otherwise made must still be considered to determine if the Determination explains the basis of its conclusions and whether they are sound.

2. *Was Ashok employed by Red Rose and, if he was, are wages due and owing?*

In the Determination, the Delegate stated as follows:

“Based on the definitions of an employee and employer in Section 1 of the Act, and the available evidence, I have determined, on a balance of probabilities, that Red Rose Furniture Gallery Ltd. and/or Red Rose Furniture Wholesale Ltd. was an employer employing Ashok Bali, the Complainant, as a delivery driver.

With respect to Issue 2, in the absence of any record evidence from the Employer I have relied on the records of the Complainant, and determined that the Complainant is owed wages....

According to the Complainant's records he was paid \$2,000.00 by the Employer, therefore a balance of \$4,034.64 is owed to him as per the enclosed calculation, and including the required vacation pay at 4% of gross wages owed, per Section 58 of the Act and \$124.20 in interest per Section 88 of the Act.

In reaching these conclusions the Delegate noted a variety of sources of evidence. Bali drove Red Rose's truck (this was acknowledged by Red Rose). Mr. Khan was interviewed by phone and in person and he confirmed that he was employed during the relevant period that Bali was a delivery truck driver for Red Rose. There was also the evidence of Bali himself.

Notwithstanding Mr. Buckley's remaining arguments on the merits (or lack thereof) of the Determination, I find the evidence she considered to be more compelling.

The burden is on the Appellant to show, on a balance of probabilities that the Determination under appeal ought to be varied or cancelled (see, for example, *Arbutus Environmental Services*, EST No. D002/96 and *Kearns*, EST No. D200/96). That burden has not been met. Further, it is well established that the basic purpose of the Act is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (see, for example, *Machtinger v. HOJ Industries Ltd.*, (1992) 1 S.C.R. 986). As well, Section 4 of the Act specifically provides an agreement to waive any of the requirements is of no effect.

I cannot find that the Director's delegate made any error in applying the Act or its principles and, therefore, I dismiss the appeal.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter dated August 21, 2000 and filed under number 021567, be confirmed.

W. Grant Sheard

W. Grant Sheard

Adjudicator

Employment Standards Tribunal