

An appeal

- by -

Davinder Hundal
(the “employee”)

- 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 (as amended)

TRIBUNAL MEMBER: Sheldon Seigel

FILE No.: 2006A/127

DATE OF DECISION: January 11, 2007

ARGUMENT

8. The Employee submitted that he was unable to attend the scheduled hearing because it was his first day of a new job. He requested that the Director adjourn the hearing, and did not request that the hearing proceed in his absence.
9. The Employee also submitted that at a mediation session with the Employer, he had requested that the Director obtain specific time-keeping records from the Employer. He indicated that such records would contain his signature and be authentic and reliable. These records were never obtained.
10. The Director submitted simply that the Employee was given the opportunity to participate fully in the adjudication of his complaint and that the appeal is based upon evidence that was already considered in the original Determination.

THE FACTS AND ANALYSIS

Adjournment

11. The only relevant undisputed facts are:
 - The Employee received notice of the hearing, and did not attend.
 - The Director contacted the Employee by telephone during the scheduled hearing time, and discussed the Employee's absence from the hearing.
12. The Employee submitted that he was unable to attend because of a work conflict and that he sought an adjournment of the hearing.
13. The Director made no submissions with respect to this claim in his appeal submissions, but did address the adjournment issue in the Determination. He stated therein:

Hundal did not attend the hearing and thus provided no sworn testimony or additional evidence with respect to the issues in dispute, except for the information already contained in the file.
14. The Director then catalogued the Employee's claim and the materials provided in support, and confirmed the Employee's attendance at a previous mediation session on May 29, 2006.
15. The Determination states:

Hundal was not present at the adjudication hearing at 9:00 a.m. on the morning of August 28, 2006. In a telephone conversation with the Branch on August 28, 2006, Hundal indicated that he would not be attending the hearing, he would not be sending a representative, he was not willing to participate over the telephone and he did not require an adjournment.
16. In his findings, the Director states that on the morning of the hearing:

Hundal acknowledged that he had received the Notice of Complaint Hearing...Hundal also stated that he did not wish to seek an adjournment of the hearing and that he was content to have the

hearing proceed in his absence. At this time Hundal was advised that the hearing would proceed in his absence and a decision made based upon "the best evidence rule"...Hundal indicated to the Delegate of the Director that he understood the process and the possible consequences of not participating in the hearing.

17. In the appeal form, the Employee submitted that he requested an adjournment of the hearing in the telephone call of August 28, 2006, and that he did not agree to the case being decided in his absence. The Employee made no further reference to his request for an adjournment in his appeal submissions.
18. The Employee says he sought an adjournment of the hearing. The Director says the Employer was invited to seek an adjournment but refused. This component of the appeal turns entirely on credibility. I have very little evidence on which to draw a conclusion in this regard.
19. The Determination indicates that the telephone call with the Employee was with a delegate of the Director, but not the delegate that decided the determination. The Director did not submit evidence of the identity of the individual who made the call, or the method of communicating the results of that call. The Director submitted no documentary evidence of the discussion with the Employee.
20. In effect, then, there is only a submission of the Employee and a contrary finding of the Director in the Determination.
21. The appellant Employee is entitled to have an opportunity to be heard. In the context of this appeal, that entitlement is entrenched in the *Act*, at s. 77:

Opportunity to respond

77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

22. The Director stated in the Determination that the Employee declined an offer for an adjournment. If that statement were found to be accurate, section 77 would be satisfied. Whether or not an adjournment was sought, however, is the central issue of this appeal.
23. The Director has not provided evidence to satisfy me of the accuracy of the statement made in the Determination that the Employee wished to have the matter proceed without adjournment.

Time Keeping Records

24. The Employee submitted that there are records in the hands of the Employer that would support his claim for wages, and that the Director did not pursue these time keeping records.
25. The Director made no submissions with respect to this claim. I note that in the supporting documents relied upon in the Determination, there is a Demand for employer records dated May 29, 2005, addressed to the Employer. That demand requires the production of "any and all payroll records" relating to the Employee.
26. I find it unfortunate that the delegate of the Director did not provide any submission with respect to this matter in the appeal. There is very little evidence on which to base a decision in this regard, but for the

aforementioned Demand, and the inclusion of some employment records- which do not appear to be those described by the Employee.

Conclusion

27. The Employee's claim that the Director erred in law appears to be based on little evidence. Though it is unfortunate that the Director chose not to respond to this claim, I find that the Employee has not met the onus of establishing that the Director erred in law by failing to pursue specified records of employment. The file does not indicate any Demand for such specific records was made by the Employee, notwithstanding his submission to the contrary.
28. The Director failed to provide any submissions or evidence that the Employee refused an adjournment. The Director therefore failed to establish that he provided a reasonable opportunity for the Employee to respond to the Employer, who did attend the hearing. As a result, I find a breach of natural justice to have occurred.

ORDER

29. Pursuant to Section 115 of the *Act*, I order the Determination dated April 25, 2003 be referred back to the Director.

Sheldon Seigel
Member
Employment Standards Tribunal