

An appeal

- by -

Andrei Enterprises Ltd. operating as The Garage Sports Bar and Grille  
("Andrei Enterprises Ltd.")

- 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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2004A/183

**DATE OF DECISION:** January 7, 2005

## DECISION

### SUBMISSIONS

Michael Krapchan on behalf of Andrei Enterprises Ltd.

J.R. Dunne on behalf of the Director

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Andrei Enterprises Ltd. (“*Andrei Enterprises*”) of a Determination that was issued on September 15, 2004 by a delegate of the Director of Employment Standards (the “*Director*”). The Determination concluded that Andrei Enterprises had contravened Part 8, Section 63 of the *Act* in respect of the employment of Eric Sakawsky (“*Sakawsky*”) and ordered Andrei Enterprises to pay Sakawsky an amount of \$338.51, an amount which included wages and interest.

The Director also imposed an administrative penalty on Andrei Enterprises under Section 29(1) of the *Employment Standards Regulation* (the “*Regulations*”) in the amount of \$500.00.

Andrei Enterprises says the Director erred in concluding there was not just cause to terminate Sakawsky.

### ISSUE

The issue in this appeal is whether Andrei Enterprises has shown there is an error in the Determination that allows or justifies the Tribunal’s intervention under Section 115 of the *Act*.

### THE FACTS

Andrei Enterprises operates a restaurant and bar. Sakawsky was employed by Andrei Enterprises as a bartender at a rate of \$10.00 an hour. He was terminated from his employment with Andrei Enterprises on, or about, November 28, 2003.

Sakawsky filed a complaint with the Director on January 8, 2004. He alleged he was owed statutory holiday pay and length of service compensation (termination pay). In his complaint, Sakawsky said he had been wrongly accused by Andrei Enterprises of stealing 30 ounces of Vodka and fired. He denied stealing any Vodka.

The Director accepted and reviewed the complaint. Andrei Enterprises was notified of the complaint. The Director attempted, unsuccessfully, to mediate a resolution of the complaint. The Director decided to conduct a hearing on the complaint and, on June 23, 2004, sent notice to Andrei Enterprises and Sakawsky by registered mail of the date, time and location for the hearing.

The Director also issued a Demand for Employer Documents on June 23, 2004. In response to that demand, Andrei Enterprises delivered a Record of Employment for Sakawsky, a computer generated “Employee QuickReport”, payroll records covering a period from November 23, 2002 to November 30,

2003 and time sheets for the period December 9, 2002 to November 30, 2003. Andrei Enterprises also submitted a reply to the complaint, addressing the issues raised in the complaint. On the issue of length of service compensation, Andrei Enterprises alleged Sakawsky was terminated for cause for events which had occurred on November 27, 2003. Four matters were raised in the reply: that 1 litre of Vodka was unaccounted for while Sakawsky was responsible for the bar; that he had failed to collect money from the pool table; that he failed to lock the safe; and that he had failed to set the security system when he left the bar. The reply says Sakawsky refused to give any explanation for these matters when asked the next day to explain.

The Determination notes neither party attended the hearing. The Director decided to adjudicate the complaint from the information provided by the parties.

The Director made findings of fact relating to the complaint. First, the Director found that Sakawsky had not earned wages for 15 days in the preceding 30 days before any statutory holiday and was, therefore, not entitled to statutory holiday pay.

Next, the Director examined the allegations made in support of cause for termination, concluding there was nothing, from an evidentiary perspective, to support the allegations. The Director noted, in respect of the allegations concerning Sakawsky's failure to collect from the pool table, lock the safe and set up the alarm system, that Andrei Enterprises had not shown these performance requirements were established and communicated to Sakawsky, that he was properly trained in respect of them, it was clearly communicated to him that failing to meet the required standards would result in dismissal or that he had failed to meet the standards.

On the matter of the missing Vodka, the Director specifically noted the requirement for Andrei Enterprises to prove, on a balance of probabilities, that Sakawsky was guilty of theft and that they had failed to do so.

In sum, the Director found Andrei Enterprises had not met the burden of showing just cause for termination and, accordingly, Sakawsky was entitled to length of service compensation.

## **ARGUMENT AND ANALYSIS**

The burden is on Andrei Enterprises, as the appellant, to persuade the Tribunal that the Director committed some error in making the Determination such that the Tribunal should intervene. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions that were, or should have been, taken during the complaint process. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) *the director erred in law;*
  - (b) *the director failed to observe the principles of natural justice in making the determination;*
  - (c) *evidence has become available that was not available at the time the determination was made.*

Andrei Enterprises has grounded its appeal on evidence becoming available that was not available at the time the Determination was made and has included additional assertions of fact on the matter of cause.

The problem for Andrei Enterprises in this appeal is that the “evidence” which has been provided in support of this ground of appeal was available at the time the Determination was made and could have been provided to the Director had Andrei Enterprises not made a conscious decision to refuse to participate in the complaint process. The Tribunal has consistently rejected appeals where the appellant, having failed or refused to cooperate with an investigation by the Director, seeks to challenge the resulting Determination on the basis that the Director did not have all the available information. In *Tri-West Tractors Ltd.*, BC EST #D268/96, the Tribunal said:

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. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. 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.

In other words, it is offensive to the statutory purposes and to provisions designed to foster a cooperative and expeditious resolution of complaints for an employer to fail or refuse to participate in the process, then later claim the Director got it wrong. That is the case here and justifies the Tribunal dismissing the appeal without further consideration or comment.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination, dated September 15, 2004, be confirmed in the amount of 838.51, together with any interest which has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**