Employment Standards TRIBUNAL

An appeal

- by -

Senor Rana's Cantina 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: Alison H. Narod

FILE No.: 2004A/182

DATE OF DECISION: January 25, 2005

BRITISH COLUMBIA

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Casa-Quinta Investments Ltd. dba Senor Rana's Cantina (the "Employer") of a Determination issued on September 28, 2004 by a Delegate of the Director of Employment Standards (the "Delegate"). The Determination concluded that the Employer had contravened the *Act* by failing to pay Wayne Coates (the "Employee") statutory holiday pay and annual vacation pay. It ordered the Employer to pay $943.52 in respect of wages and interest, as well as $1,000 in respect of administrative penalties, for a total of $1,943.52.

The Employer appeals the decision on the ground that evidence has become available that was not available at the time the Determination was made.

ISSUE

The issue in this case is whether or not the Employer is entitled to introduce evidence in this appeal on the basis that it was not available at the time the Determination was made.

FACTS

There is no dispute that the Employer operated a restaurant and that the Employee was employed as a cook in the Employer's business from July 1, 2002 to October 11, 2003, although he was laid off for the period of October to December, 2002.

There is a dispute about what were the Employee's wages and how many hours per week he worked. The Employee completed a Complaint Information Form, which he signed on November 21, 2003. According to that Form, the Employee claimed that he worked seven hours a day, five days a week, for a total of 35 hours a week and was paid at a wage rate of $12.00 an hour. Among other things, the Employee claimed he was not paid for statutory holidays and was not provided with annual vacation pay.

According to the Determination, the Employee delivered a self-help kit to the Employer in accordance with the *Act*, but was unable to settle the dispute directly with the Employer. His employment standards complaint was received by the Employment Standards Branch on December 4, 2003. The Branch conducted a corporate search on December 4, 2003.

According to the Determination, messages were left for the Employer to contact the Branch about the complaint on December 23 and 30, 2003, but no response was received. Fernando Carrizo was contacted on January 4, 2004 because he was listed on the corporate search as one of the Employer's directors. The details of the complaint were conveyed to him at that time. He

responded that he was unaware that he was listed as a director, that he was not the Employer, and that he had just worked at the restaurant.

The Branch sent a letter to the Employer at the address of its registered office indicating that the Employee was claiming unpaid statutory holiday and vacation pay and seeking production of the Employer's payroll records by January 21, 2004. Enclosed with that letter was a Demand for Employer Records requiring the Employer to produce employment records by January 21, 2004.

On January 21, 2004, Rodolfo Carrizo, who was listed on the corporate search as the secretary and a director of the Employer, contacted the Branch. He acknowledged receipt of the Demand and said that he had the requested employment records and would mail them to the Branch.

The Branch again contacted Fernando Carrizo on February 3, 2004, in an effort to find Rodolfo Carrizo, because the employment records had not yet been received. Fernando Carrizo advised that Rodolfo Carrizo had all the records and he would call back with Rodolfo Carrizo's telephone number.

On May 3, 2004, Fernando Carrizo was contacted again by telephone and was asked about the employment records. He provided Rodolfo Carrizo's telephone number. The Branch contacted Rodolfo Carrizo to inquire about the whereabouts of the records. During this conversation Rodolfo Carrizo stated that he did not have them and that he had destroyed them. The company's and directors' responsibility for retaining employment records, as well as the fines that could be imposed under the *Act* in the absence in production of such records in accordance with a Demand for Records were explained to Rodolfo Carrizo at that time.

On May 18, 2004 another Demand for Employer Records was sent to the Employer's registered and records office, as well as to all of the directors listed in the corporate search. No response was received. All of the registered letters were returned as unclaimed.

According to the Determination, during the above-noted conversations with Fernando and Rodolfo Carrizo, the Delegate explained the extent of the Employer's and the directors' exposure and the penalty provisions of the *Act*. The Delegate invited participation in the investigation more than once, via telephone conversations and registered mail, and all requests were met with no response.

It does not appear from the Determination or the Delegate's file that the Employee supplied any records in support of his claim that he worked seven hours a day, five days a week for a total of 35 hours a week at the hourly rate of $12.00. However, the Delegate observed that the Employer submitted no information to contradict the Employee's assertions. The Employer did not provide any records to explain its position and did not disagree with the information provided by the Employee. In the absence of information contradicting the Employee's assertions, the Delegate accepted the Employee's unchallenged evidence.

ARGUMENT

The Employer asks that the Determination be varied. It says that the amount owed for vacation pay was wrongly calculated, because the Employee worked 20 to 25 hours per week over a five day week at the hourly rate of $10.00 an hour, not 35 hours a week at the hourly rate of $12.00. In support, the Employer encloses a copy of the Employee's 2003 T4 Form – Statement of Remuneration Paid, which was sent to Revenue Canada. That Form states that the Employee earned $9,450 in the calendar year 2003. That Form, I note, is undated. The Employer also encloses a copy of a Record of Employment Form issued in the Employee's name on October 15, 2003, which indicates that the Employee earned $9,450 during the period of January 2, 2003 to October 11, 2003.

Additionally, the Employer asks that the order respecting payment for statutory holidays be recalculated because the Employee only worked an average of 24 to 25 hours a week from Tuesday to Saturday. The Employer's operations were closed on Mondays and the Employee never worked on Sundays.

Further, the Employer says that the Employee never complained to the Employer about the issue of vacation pay and statutory holiday pay.

In response, the Delegate summarizes the efforts made to contact and obtain information from the Employer and to provide the Employer with information respecting the nature of the Employer's case and obtain the Employer's response. The Delegate says that reasonable efforts were made to notify the Employer of the complaint, the dispute resolution process and the requirements of the legislation and that the Employer was given ample opportunity to respond and chose not to do so. Additionally, the Delegate notes that the Demands for Employer Records were properly served on the Employer in accordance with the *Act*, by sending them via registered mail, and that the Employer was treated fairly and the principles of natural justice were applied.

In reply, the Employer points out that it does not appeal on the grounds of error of law or lack of fairness. Rather, the appeal is about new evidence that has become available which was not available at the time the Determination was made. The Employer explains that these documents were not supplied before the Determination was written because it could not find them. All the Employer's documents, records and paperwork were kept in the restaurant. The Employer had to vacate the restaurant in a hurry and in the confusion a lot of things were lost. The Employer said that it found the documents later, by chance, in a drawer at Rodolfo Carrizo's home. Had it found them earlier, it would have provided them then.

With respect to its position about statutory holiday pay, the Employer says the Employee is entitled to four days of statutory holidays, only, since the rest of the holidays which the Employer was ordered to pay were days that fell on the Employee's day off or days when the restaurant was closed. Additionally, they should be recalculated on the basis of a wage rate of $10.00 an hour.

DECISION

I have reviewed the evidence and the submissions and have concluded that the Delegate made no error based on the information that was before her. She made reasonable efforts to apprise the Employer of the case against it and provide the Employer with reasonable opportunities to respond. It did not do so and, in particular, it did not contest the Employee's allegations respecting the hours he worked, the hourly rates he was paid, or the statutory holidays for which he was not paid.

The sole issue, in this appeal, is whether or not the evidence now provided by the Employer is evidence which has become available which was not available at the time the Determination was being made. The Determination, as noted, was made on September 28, 2004. The Employee's T4 Form is undated, but one would expect it would have been issued in time for the Employee to file his income tax in April of the 2004 calendar year. The Employee's Record of Employment is dated October 15, 2003. Accordingly, there is no basis on which to conclude that these documents did not exist by the time the Determination was issued.

The Tribunal has indicated that its practice regarding accepting evidence from parties which was not produced to the Director during the investigation stage of the process is clear. The general rule is that at an appeal parties will not be permitted to rely on evidence that was available and could have been presented to the investigating officer. The clearer it is to the Tribunal that there has been a concerted refusal by a party to participate in an investigation, the stricter this principle will be applied (*Tri-West Tractor Ltd.*, BC EST #D268/96; *Kaiser Stables Ltd.*, BC EST #D58/98; and *Specialty Motor Cars (1970) Ltd.*, BC EST #D570/98).

This rule was not applied where an employer took the position during an investigation that it had complied with the *Act* and that documents in support existed, but it was having difficulty locating the documents (*Falcon Overhead Doors Ltd.*, BC EST #D405/99). The Tribunal held that in such circumstances, the evidence might be described as "late evidence" but not "new evidence" of the kind normally rejected by the Tribunal and may be admitted. Those are not the facts of the instant case. Here, the Employer did not contest the Employee's claims, although it could have done so without need for documentary evidence in support. Moreover, it contended that the documents had been destroyed and gave no indication that they might have been misplaced and that a continued search might discover their location.

The Tribunal has also said that the test for admitting new evidence is a relatively strict one and must meet four conditions:

(a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

(b) The evidence must be relevant to a material issue arising from the complaint;

(c) The evidence must be credible in the sense that it was reasonably capable of belief; and

(d) The evidence must have high potential of probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on a material issue.

I find that the evidence does not meet the first of the above-noted conditions, although it may well have met the other three conditions. There is no indication that the evidence could not, with the exercise of due diligence, have been discovered. More specifically, there is no indication that the Employer conducted a search for the evidence and failed to discover it before the Determination was made. Additionally, one would expect that the Employer could have obtained copies of one or both of the documents from other sources. For example, one would expect that the T4 Form would have had to be filed with Canada Customs and Revenue Agency and that a copy might be obtained from that source. Further, the Employer could have suggested that the Director obtain these forms from the Employee, since one would have expected the Employer to provide copies of them to him.

It is somewhat troubling that these documents were not supplied by the Employee as part of his proof of claim and that the Director did not seek production of them from the Employee. The Tribunal has noted in its case law that the Director has an overarching responsibility to investigate. It is able to demand production of documents not only from employers, but also from employees (section 85). In the instant circumstances, however, the appeal is made on the limited ground of evidence that has become available that was not available at the time the determination was made and the appeal fails on that ground.

With respect to the Employer's allegation that the Employee is not entitled to statutory holiday pay for statutory holidays falling on the Employee's days off or days the restaurant was closed, I note that this allegation is not one that properly falls under the ground of appeal asserted (ie, the new evidence ground).

For the foregoing reasons, the appeal is dismissed.

Alison H. Narod
Member
Employment Standards Tribunal