

An appeal

- by -

672108 BC Ltd. carrying on business as Tsawwassen Lanes
(the “Employer”)

- 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 M. Seigel

FILE No.: 2007A/149

DATE OF DECISION: February 11, 2008

DECISION

SUBMISSIONS

Brian Coe	on behalf of the Employer
Betty Melynychuk	an Employee
Carey Barrett	an Employee
Glen Smale	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by the Employer, of a Determination that was issued on October 26, 2007 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that the Employer had contravened section 63 of the Act, in respect of the employment of the Employees, and ordered the Employer to pay to the Employees the amount of \$600.77. This amount included compensation for length of service (s.63 of the Act) and accrued interest (s.88 of the Act).
2. The Director also imposed administrative penalties on the Employer under Section 29(1) of the *Employment Standard Regulation* (“Regulation”) in the amount of \$500.00 relating to non-payment of termination pay (s.63 of the Act).
3. The Employer submits that the Director erred in law or failed to observe the principles of natural justice in making the Determination.
4. An oral hearing was requested. The Tribunal determined that the appeal would be decided by a Member based on the written submissions received from the parties.

ISSUES

5. The issues in this appeal are:

Did the Director err in law?

Did the Director fail to observe the principles of natural justice in making the Determination?

ARGUMENT

6. The Employer filed an appeal annexed with four pages. Page one contains a short excerpt of the Determination and a request for a copy of the complaints filed with the Tribunal by each of the Employees.
7. Page two contains reference to s.65(1)(c) of the *Act*, and two paragraphs which appear to be an explanation of Employee Melynychuk's working schedule and seasonal work activities. Section 65(1)(c) provides an exception to other obligations under the act for employees "employed for specific work to be completed in a period of up to 12 months."
8. Pages three and four deal with the Employer's unhappiness with a statement made by the Delegate in the Determination. That statement is:

Coe told her "verbally" on June 16, 2007 that she would be laid off on June 30, 2007 but that he was vague about the reasoning behind the closure.

9. The Employer does not clarify his position with respect to each of these sections of his appeal. I will proceed on the basis that the Employer submits that each of these sections represents either an example of an error in law, a breach of the principles of natural justice, or both.

ANALYSIS

10. In his appeal documents the Employer requests copies of the complaints of each of the Employees. His submissions state:

I am formally requesting a copy of both complaints... as to ensure the accuracy of the entire complaint.

11. The Delegate indicates in his submissions:

The Employer never requested copies of the complaint forms from the Delegate during the lengthy investigative process. There was no written or oral request from Coe for these documents and if he had done so he would have received them with certain identifiers such as the social insurance numbers being removed.

12. A party to an administrative process is entitled to know the case against him. This is a fundamental tenet of administrative law. There is, however, no corresponding obligation of an opposing party to volunteer supporting documents absent a reasonable request by the first party.

13. I accept the Delegate's reply that the Employer did not request the original complaint documents during the investigation of this matter. It appears from the record that the Employer did not make any request for the original complaint document until this appeal. Further, a careful reading of the Determination confirms that the text of the original complaints is not relevant to the extent that the allegations on which the Determination was based are simple: the Employees were not given notice of termination in accordance with the *Act*.

14. I find that by participating in the administrative process with an obvious understanding of the issues, and absent making a request for the original complaint, the Employer has waived any right he might have had to view the original complaint documents.
15. An appeal is designed to address errors that the fact finder- in this case, the Delegate- may have made. An appeal is not designed to allow a disgruntled party to put aside a decision for reason only that the Appellant did not make a request for something he might have received had he made the request.
16. I find that the Employer knew the substance of the complaints against him and was not prejudiced by his own failure to request a copy of the formal complaint during the process leading up to the Determination.
17. The Employer submits that the described work schedule for Betty Melynychuk was captured by s.65(1)(c) of the *Act*. These submissions are insufficient for the purpose of establishing whether Ms. Melynychuk was hired for purposes described in s.65(1)(c). It is also unclear from the submissions as to whether the Employer is arguing that the Employee's working schedule was different from that submitted for the investigation leading up to the Determination. More importantly, however, is the timing of this plea. The Employer does not indicate whether this submission represents new evidence of Ms. Melynychuk's working schedule or a new argument based on the original evidence. Absent a particular submission of new evidence that was not available at the time of the Determination, I find that this argument is one that might have been made to the Delegate prior to the Determination. Again, the purpose of an appeal is to address allegations of errors made in the finding of first instance. A party may not hold back one or more primary arguments from the original fact finder as fodder for a re-hearing of the matter.
18. The Employer submits that he has "concern with [a] statement in the findings..." He follows that submission with a lengthy description of his relationship with the Employee Barrett, Barrett's mother, and Barrett's relationship with Ms. Melynychuk. He also describes in some detail, his position with respect to conversations with Ms. Barrett and Ms. Barrett's mother about the closing of his business.
19. There is no indication that any of the factual allegations are new evidence not available at the time of the Determination. This form of appeal is not an opportunity for a re-argument of issues already adjudicated upon by the Delegate. Further, the Employer appears more concerned with an accusation of being "vague about the reasoning behind the closure" than the critical component of having told Ms. Barrett verbally that she would be laid off. Indeed, the Employer concludes his submission with:
- I feel Carey was fully informed as to the situation, and was given appropriate notice.
20. The Delegate considered this matter and in his Determination he concludes that proper notice was not provided in accordance with the Act.
21. Finally, a close review of the Determination satisfies me that a satisfactory investigation was conducted, the Employer had ample opportunity to provide information and make his positions known, and the Delegate considered all of the information before him and made a reasoned and supported decision based on that information.
22. I find no evidence that the Delegate of the Director erred in law or failed to observe the principles of natural justice in making the Determination.
23. The appeal fails on all grounds.

ORDER

24. Pursuant to section 115 of the Act, I confirm the Determination.

Sheldon M. Seigel
Member
Employment Standards Tribunal