Employment Standards TRIBUNAL

An appeal

- by -

Tatlows Broiler Bar Inc.

- 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: Carol Ann Hart

FILE No.: 2005A/217

DATE OF DECISION: March 7, 2006

DECISION

SUBMISSIONS

Michael Loukas	on behalf of Tatlows Broiler Bar Inc.
Sarah Wetmore	on her own behalf
Jennifer Wetmore	on her own behalf
Ken MacLean	on behalf of the Director

OVERVIEW

1. This is an appeal by Tatlows Broiler Bar Inc. ("Tatlows") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") of a Determination issued on November 18, 2005 by a delegate of the Director of Employment Standards (the "Director").

2. In the Determination, the Delegate for the Director (the "Delegate") found that Tatlows had contravened the *Act* as it had failed to pay regular wages, statutory holiday pay, annual vacation pay, and compensation for length of service; and had made deductions from the wages of the three complainants which were paid into a dine and dash fund. An order for payment of the outstanding amounts plus accrued interest was made in the total amount of $4358.19. The Delegate further ordered Tatlows to pay administrative penalties in the total amount of $3000.00 ($500.00 for each of six contraventions of the *Act*).

3. The appeal is brought on the grounds that the Director erred in law, the Director failed to observe the principles of natural justice in making the Determination, and that there was new evidence which was not available at the time the Determination was made.

4. Although from his notation on the Appeal Form, Mr. Loukas appeared to be seeking an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUES

5. The issues in this case are the following:

Did the Director err in law in making the Determination?

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

Should the appeal be allowed on the basis that there is new and relevant evidence which was not available at the time of the Determination?

BACKGROUND

6. A complaint was filed by Sarah Wetmore, Jennifer Wetmore and Heather Cowtan alleging that Tatlows had failed to pay regular wages, statutory holiday pay, annual vacation pay, compensation for length of service; and had required that the complainants pay business costs (payments into a dine and dash fund) in contravention of section 74 of the *Act.*

7. Sarah Wetmore was employed as a Manager; and Jennifer Wetmore and Heather Cowtan were employed as Servers at a restaurant operated by Tatlows.

ARGUMENT

8. Michael Loukas, Director Tatlows Broiler Bar Inc. wrote that he had received a telephone call on March 11, 2005 from the Delegate, and a registered letter dated March 21, 2005 from the Delegate offering the opportunity to mediate, but he had declined to agree to a mediation. According to Mr. Loukas, the only further communication he received concerning this matter was a registered letter dated April 14, 2005 outlining the facts and the nature of the complaints.

9. Mr. Loukas noted that he had sold his business on July 29, 2005 with a possession date of August 1, 2005. He maintained that the signature for receipt of the letter dated July 28, 2005, which was sent by the Delegate by registered mail was not *his* signature. Mr. Loukas maintained that the Delegate should have contacted him at his home address, knowing that the business was being sold. He indicated that he would have provided the information required by the Delegate if he had received the Delegate's letter dated July 28, 2005.

10. Sarah Wetmore wrote that she had not received a final paycheque, and she believed that Mr. Loukas had falsely created the pay stubs which he had sent to the Delegate. Ms. Wetmore submitted that bank statements provided for the joint account (in her name and the name of Jennifer Wetmore) demonstrated that the final paycheques had never been received from the appellants.

11. Jennifer Wetmore wrote that she had never received any pay for her final period of employment from January 16-31, 2005; and had not received vacation pay for the period from September 16, 2004 to the end of her employment in January 2005. She also referred to the bank statements from the joint account for herself and Sarah Wetmore as evidence to demonstrate that these amounts were not received. Ms. Wetmore wrote that she believed that Mr. Loukas had falsely created the pay stubs which were submitted for the record to avoid paying her, Heather Cowtan and Sarah Wetmore.

12. The Delegate submitted that the appellants had provided no evidence that they had not been given the opportunity to respond to the allegations of the complainants. The Delegate reviewed the history of correspondence with the appellants in his submissions. He noted that the fact that the appellants had submitted partial payroll records to the Delegate indicated that they had received his letters.

13. The Delegate underlined that the letter sent by registered mail on July 28, 2005 to the operating address of the appellants had been signed for by Mr. Loukas. He further noted that a letter sent in early January 2006 to the former operating address of the appellants was refused by the new business, and was returned to the Employment Standards Branch office.

14. It was further submitted by the Delegate that the appeal should also not be allowed on the basis that there was new and relevant evidence because the appellants were not in a position to show that the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation.

ANALYSIS

15. Tatlows has the burden, as the appellant, of persuading the Tribunal there is a reviewable error in the Determination. The grounds upon which an appeal may be made are found in subsection 112(1) of the *Act*, which provides as follows:

> 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.

Error in Law

16. The appellants advanced no evidence to show that there was an error in law. The documentation on record and the Determination demonstrate that there was evidence to support the findings of fact made by the Delegate, and I cannot conclude that the view of the facts taken by the Delegate was one that could not reasonably be entertained given the evidence he had before him in making the Determination. In my view, the Delegate applied the law correctly in arriving at his conclusion. I dismiss the allegation that the Director erred in law in making the Determination.

Denial of Natural Justice

17. An appeal to the Tribunal is not a re-investigation of the complaint. It is also not intended to be an opportunity to rectify any deficiencies in the presentation of a party's position during the investigation process.

18. The appellants were provided with the Request for Payment forms for the three complainants but there was no reply. On April 11, 2005, the Delegate offered the appellants the opportunity to participate in a mediation of the complaints. The appellants expressly declined that opportunity.

19. The record reveals that on April 14, 2005, the Delegate sent a letter to the appellants by registered mail requesting a written response to the complaints and payroll information. No written response was sent by the appellants, but partial payroll information was submitted, and the representative for the appellants wrote "starting point" and "more to follow" on the documentation. Clearly, the appellants received the correspondence from the Delegate dated April 14, 2005, and they were aware of the complaints being brought against them.

20. On July 28, 2005 the Delegate sent another letter by registered mail to the appellants again requesting the payroll information and a written response to the allegations. On July 29, 2005 the appellants' business was purchased by Tatlows Holdings Ltd. The possession date was August 1, 2005.

21. The letter sent by registered mail on July 28, 2005 was tracked through the Canada Post tracking system, and the Delegate concluded that Michael Loukas had accepted delivery of the letter on July 29, 2005. A copy of the signature on a Canada Post tracking document dated July 29, 2005 appears on the record. This is *prima facie* evidence that the document sent by registered mail was received by Mr. Loukas. In the face of that evidence, the burden of proof is on the appellants to establish that the document sent by registered mail was not, in fact, received.

22. Mr. Loukas provided no evidence to demonstrate that the signature on that document was not his. He did not indicate who he believed might have signed for the documents, or provide any evidence from the new owners of the business. There was no evidence concerning the requirements of Canada Post for acceptance of registered mail. In the absence of such evidence, the appellants have failed to rebut the presumption, created by the signature on the registered mail tracking document from Canada Post, that Mr. Loukas had signed for the registered mail. I conclude on the balance of probabilities that Michael Loukas received the registered mail on July 29, 2005.

23. It is well-established in Tribunal decisions that on appeal a party may not rely on evidence which was available during the investigation stage of the process, but was not submitted to the Delegate: *Re Tri-West Tractor Ltd.*, BCEST #D268/96, *Re Kaiser Stables Ltd.*, BCEST #D058/97, *Re J.P. Metal Masters 2000 Inc.*, BCEST #D057/05. I find that the appellants received the correspondence sent by the Delegate, and were aware of the complaints, but chose not to participate in the investigation. The allegation that there was a denial of natural justice because the appellants were not given a chance to respond to the allegations cannot be upheld.

New Evidence

24. New evidence is not new merely because a party failed to participate in the investigation: *Re Save Energy Walls Ltd.*, BCEST #D203/04. The Tribunal will not allow the appeal process to be used to make the case that the employer should have put forward to the delegate during the investigation. I dismiss the appeal on the basis that there is new evidence which was not available at the time the Determination was being made.

25. For all of the above reasons, I dismiss the appeal and confirm the Determination plus applicable interest in accordance with section 88 of the *Act*.

ORDER

26. Pursuant to Section 115 of the *Act*, the Determination dated November 18, 2005 is confirmed together with any interest which may have accrued since the date of issuance.

Carol Ann Hart
Member
Employment Standards Tribunal