

An appeal

- by -

657180 B.C. Ltd. carrying on business as
Four Points by Sheraton Prince George
("Four Points")

- 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: David B. Stevenson

FILE No.: 2007A/164

DATE OF DECISION: March 10, 2008

DECISION

SUBMISSIONS

Mohammad Golam	on behalf of 657180 B.C. Ltd.
Valerie Scott	on her own behalf
Hans Suhr	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by 657180 B.C. Ltd. carrying on business as Four Points by Sheraton Prince George (“Four Points”) of a Determination that was issued on November 22, 2007 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Four Points had contravened Part 3, Sections 18 and 28, Part 4, Section 40, Part 5, Section 46, Part 7, Section 58, and Part 8, Section 63, of the *Act* in respect of the employment of Valerie Scott (“Scott”) and ordered Four Points to pay those Scott an amount of \$9,217.44, an amount which included wages and interest.
2. The Director also imposed administrative penalties on Four Points under Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$2000.00.
3. The total amount of the Determination is \$11,217.44.
4. Four Points has filed an appeal of the Determination, alleging the Director failed to observe principles of natural justice in making the Determination and has asked that the Determination be cancelled.
5. Four Points has also requested a suspension of the Determination pending the outcome of the appeal. Four Points says a suspension is required because “the Determination was not just” and the Director “missed or misunderstood the evidence”. The reasons advanced in support of the suspension request are inconsistent with the grounds of appeal.
6. Four Points does not seek an oral hearing on the appeal.
7. The Tribunal has a discretion whether to hold a hearing on an appeal and, if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 16 of the Tribunal’s Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

8. The issue in this appeal is whether Four Points has shown the Director failed to observe principles of natural justice in making the Determination, or committed any other reviewable error in making the Determination. A supplementary issue, if an error is found, is whether effect of the Determination should be suspended under Section 113 of the *Act*.

THE FACTS

9. The following background is provided:

657180 B.C. Ltd. carrying on business as Four Points by Sheraton Prince George operates a hotel which falls within the jurisdiction of the *Act*. Valerie Scott was employed as Director of Sales. The complaint was filed in the time period allowed under the *Act*.

10. The issues raised in the complaint were identified as being whether Four Points misrepresented the availability of the position to Scott, whether Scott was paid the correct rate of pay, whether Scott was a manager under the *Act*, whether, if she was not a manager, she was entitled to overtime wages for additional hours and statutory holidays worked, and whether Scott was entitled to some amount of length of service compensation. The Determination contains an extensive review of the facts provided by Four Points, by Scott and by three other persons interviewed during the complaint process.

11. The Director made the following findings on each of the issues:

1. The availability of the position was misrepresented to Scott, but this part of Scott's complaint was filed out of time and, as a result, was not adjudicated;
2. Scott was not paid the correct rate of pay;
3. Scott was not a manager under the *Act*;
4. Scott worked hours in excess of 8 hours in a day and worked on three statutory holidays and was entitled to be paid overtime wages in respect of that work; and
5. Four Points did not have just cause to terminate Scott and as a result she was entitled to one weeks' length of service compensation.

ARGUMENT

12. Four Points has grounded the appeal in an alleged failure by the Director to observe principles of natural justice in making the appeal. An extensive appeal package has been filed, comprising a four page submission and twenty-two documents.
13. The submission reviews the written reasons for the Determination and, generally, provides Four Points' perspective on most of the findings made by the Director on the issues set out in the Determination. Four Points' perspective is supported with reference to the accompanying documents.

14. Essentially, the submission simply revisits the position of Four Points on whether Scott was a manager and whether she had been paid the correct rate of pay. The additional documents used to support their arguments are not found in the Section 112 record. The appeal also challenges evidence provided by one of the witnesses interviewed by the Director during the complaint process, alleging critical parts of this evidence was fabricated.
15. Scott has provided a response to the appeal submission. In the main, she responds to the assertions of fact made by Four Points and the relevance and effect of new documents provided with the appeal. Her submission does, however, include two matters which require separate comment.
16. The first is her request that her claim under Section 8 of the *Act* be looked at again. The Tribunal is a creature of statute. Its powers are defined and limited by the *Employment Standards Act*: see *Old Country Restaurant Ltd.*, BC EST #D561/98. The role of the Tribunal under the *Act* is to receive and consider appeals and reconsiderations. The Tribunal has not been given the authority to “look again” at Scott’s complaint under Section 8. In the circumstances present here, the Tribunal only has authority to consider an appeal of the Director’s decision in respect of that complaint. Considered against that statutory authority, her request can only be viewed by the Tribunal as an appeal of her own in respect of the refusal of the Director to adjudicate that part of her complaint.
17. The appeal request is late. Section 112 sets out the requirements for filing an appeal; subsection 112(3) describes the appeal period as follows:
- (3) *the period referred to in subsection (2) is*
- (a) *30 days after the date of service of the determination, if the person was served by registered mail, and*
- (b) *21 days after the date of service of the determination, if the person was personally served or served under section 122 (3).*
18. Any appeal of the Determination which Scott wished to make should have been filed no later than December 31, 2007.
19. In *Metty M. Tang*, BC EST #D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend time limits for filing an appeal:
- Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.
20. Scott has not provided any explanation for failing to file a timely appeal on this part of the Determination. She has not made any request to the Tribunal for an extension of the time for filing. As well, her request, as it is presently framed, does not comply with the statutory requirements for filing an appeal or with the Tribunal’s rules of procedure. Her request to “look again” at that part of the Determination dealing with Section 8 will not be addressed in this decision.
21. The second matter relates to her request for the Director to publish information relating to contraventions of the *Act* by Four Points in a Prince George newspaper. My comment on that matter is that the Tribunal

has no authority to order or instruct the Director on whether to exercise the discretion given to the Director in Section 101 of the *Act*.

22. The Director has also provided a response to the appeal. The Director makes the following points:
- Four Points was provided with several opportunities to respond to the claims made by Scott and to provide any information they wished the Director to consider in making the Determination;
 - There is no evidence in the appeal to support the allegation that the Director failed to observe principles of natural justice;
 - None of the documents submitted with the appeal were provided to the Director during the complaint process; and
 - Four Points is merely re-arguing the facts, seeking a different result from the Tribunal.
23. The Director has provided the Section 112 record.
24. Four Points has filed a final reply. Much of it repeats assertions made in the initial appeal submission and similarly refers to documents filed with the appeal submission. Other parts of the final reply contest assertions made by Scott in her response

ANALYSIS

25. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those 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.*
26. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.
27. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03).

28. Four Points has grounded this appeal in the allegation that the Director failed to observe principles of natural justice in making the Determination. As the Tribunal said in *Imperial Limousine Service Ltd.*, BC EST #D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated*, BC EST #D050/96).

29. Parties alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).

30. There are no submissions in the appeal specific to this ground and no evidence that Four Points was not provided an opportunity to know the position being taken by Scott and given an opportunity to respond. I find that Four Points has failed to meet the onus of demonstrating on a balance of probabilities that the Director failed to observe principles of natural justice in making the Determination.

31. At its core, however, this appeal is not about principles of natural justice at all, but is about a disagreement by Four Points with the conclusions reached by the Director on the complaint. Four Points has submitted 22 documents with the appeal that were not provided to the Director during the complaint process. It is fair to say all of the documents and the information contained in them, while they are “new” to the process in the sense that they are being submitted by Four Points for the first time at the appeal stage to support the arguments being made against the Determination, is not “new” evidence. It is all evidence that was available to Four Points at the time the Determination was being made. Much of this new evidence comprises Four Points’ own documents. Points West has not indicated anywhere in the appeal why this evidence was not provided during the investigation.

32. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal has discretion to allow new or additional evidence. In addition to considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03 and *Senor Rana’s Cantina Ltd.*, BC EST #D017/05). In addition to my conclusion that this evidence was available to Four Points during the complaint process, Four Points has not shown that this “new” evidence to be either relevant or probative.

33. As well, if this new evidence is, as Four Points suggests, important information relating to the validity of Scott’s claim, not only could this information have been provided to the Director during the complaint process, but it *should* have been provided to the Director. The failure of Points West to do so raises circumstances that fall squarely within the principle described by the Tribunal in *Tri-West Tractor Ltd.*,

BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97 and provides additional justification for refusing to accept this evidence in the appeal process

34. As indicated above, this appeal is about no more than Four Points' disagreement with findings of fact and discretionary judgements made by the Director in the Determination. Under the *Act*, the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03) and the Tribunal is reluctant to disturb discretionary judgments relating to the calculation of wages unless it can be shown the exercise of discretion was an abuse of power, the Director made a mistake in construing the limits of his authority, there was a procedural irregularity or the decision was arbitrary, unreasonable or based on irrelevant considerations (see *Jody L. Goudreau and Barbara Desmarais*, BC EST #D066/98 and *Takarabe and others*, BCEST # D160/98). Four Points has not shown any error of law in the findings of fact made by the Director and no basis for disturbing the wage calculation made by the Director.
35. The appeal is dismissed.
36. Based on this conclusion, it is unnecessary to consider the suspension application under Section 113 of the *Act*.

ORDER

37. Pursuant to Section 115 of the *Act*, the Determination, dated November 22, 2007, is confirmed in the amount of \$11,217.44, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal