

An appeal

- by -

0826765 BC Ltd. carrying on business as Biothera Clinics

(the “Appellant”)

- 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.: 2011A/005

DATE OF DECISION: March 31, 2011

DECISION

SUBMISSIONS

Alfred Catalina	on behalf of 0826765 BC Ltd. carrying on business as Biothera Clinics
Karen Eisenzimmer	on behalf of herself
Megan Roberts	for of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed by 0826765 BC Ltd. carrying on business as Biothera Clinics (the “Appellant” or “Biothera Clinics”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), of a Determination of the Director of Employment Standards (the “Director”) issued on December 2, 2010 (the “Determination”).
2. In the Determination, the Delegate for the Director (the “Delegate”) found that compensation for length of service in the amount of \$1248.00, and vacation pay of \$1611.56 was owing to Karen Eisenzimmer. Three mandatory administrative penalties of \$500.00 each were imposed under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for contraventions of sections 58 and 63 of the *Act*, and s. 46 of the *Regulation*.
3. The Appellant contends that there is new and relevant evidence, and requests that the Determination be changed or varied.

ISSUE

4. The first issue in this case is whether the appeal period should be extended.
5. If the appeal period is extended, the second issue is whether the Determination should be cancelled or referred back to the Director on the basis that there is new evidence which was not available at the time the Determination was being made.

THE FACTS

6. According to the Determination, a complaint was filed by Karen Eisenzimmer, alleging that her former employer had failed to pay vacation pay and compensation for length of service, in contravention of the *Act*. Ms. Eisenzimmer was employed as a Laser Technician and Receptionist for Biothera Clinics, a laser hair therapy clinic, from May 5, 2008 until May 7, 2010, when her employment was terminated. The employer dismissed Ms. Eisenzimmer without notice or pay in lieu of notice.
7. An investigation was conducted by the Delegate. Biothera Clinics contended that Ms. Eisenzimmer was trying to steal two hair lasers worth several hundred dollars each, and consequently, her employment was terminated for cause. Ms. Eisenzimmer maintained that she had not attempted to steal the lasers, and therefore Biothera Clinics had terminated her employment without cause.

8. The Delegate determined that Biothera Clinics did not have just cause to terminate the employment of Ms. Eisenzimmer; and compensation for length of service, vacation pay, and interest were owing to Ms. Eisenzimmer.
9. The Delegate noted in the Determination that despite the requests and demands made to the employer for records, and the time in which to provide the records being extended; Biothera Clinics did not respond or provide the requested records or any documentation during the investigation.

ARGUMENT

For the Appellant

10. Attached to the Appeal Form were witness statements regarding the termination of Ms. Eisenzimmer's employment and time sheets for Ms. Eisenzimmer for the period from May 1, 2009, to May 7, 2010.

For the Respondent

11. The respondent maintained that the allegation that she had attempted to steal the lasers in question was unfounded. She also wrote that the time sheets submitted by Biothera Clinics were not in her handwriting, which meant that someone had rewritten all of the time sheets for the one-year period before she was terminated.

For the Director

12. The Delegate noted that the appeal was filed one day late, despite the fact that Biothera Clinics was given repeated opportunities to provide the evidence which had subsequently been submitted in support of the appeal. She indicated that the Director would not take any position on accepting the late appeal.
13. The Delegate wrote that the information submitted with the appeal by Biothera Clinics was available for submission during the investigation. Numerous opportunities to provide evidence and participate in the investigation were provided to the employer, including a review of correspondence containing the Delegate's preliminary findings. Furthermore, Biothera Clinics had not shown that, if the evidence submitted with the appeal had been considered prior to the Determination being issued, a different conclusion would have been reached in the Determination.

ANALYSIS

Should the appeal period be extended?

14. The appeal was filed on January 11, 2011, which was one day following the expiry of the period in which to appeal. Under section 109(1)(b) of the *Act*, the Tribunal may extend the time for requesting an appeal, even though the appeal period has expired. The appellant has the onus of establishing that the period in which to file an appeal should be extended.
15. In a letter dated January 11, 2011 written by Melissa Pearson, Assistant Program Coordinator, Biothera Clinics, a request was made for an extension of time to file the appeal on the basis that written statements and documentation from an accountant had not been received. It was noted that the deadline for filing the appeal fell on a Monday, and the clinic was closed on Mondays. As set out above, the Director did not take a position on the late filing of the appeal.

16. The Tribunal has held consistently that it should not grant extensions under Section 109(1)(b) as a matter of course, and it should exercise its discretionary powers only where there are compelling reasons to do so. I was not persuaded that the appeal period should be extended in this case. Efforts should have been made to ensure that all evidence was available so that it could be provided before the expiry of the appeal period. In any event, I have determined, as set out below, that the appeal would not succeed on its merits.

Should the Determination be cancelled or referred back to the Director on the basis that there is new evidence which was not available at the time the Determination was being made?

17. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision reads:

- 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 being made.

18. This appeal relies on the ground that there was new evidence which was not available at the time the Determination was being made. The Tribunal set out four requirements which must be met before new evidence will be considered on appeal in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03. The appellant has the burden of proving all of the following:

- 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;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential 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 the material issue.

19. In order to succeed in an appeal on the ground of new evidence, an appellant must not only show that the new information was not considered by the Delegate. The new evidence the party seeks to submit must have been unavailable at the time of the investigation.

20. No explanation was provided as to why Biothera Clinics failed to comply with the Demand, and did not provide any documentary evidence prior to the Determination being issued.

21. New evidence is not new merely because a party failed to participate fully in the investigation (See: *Save Energy Walls Ltd.*, BC EST # D203/04). Section 46 of the *Regulation* provides that records required in a Demand must be produced and delivered to the Director “*as and when required*”.

22. After reviewing the Record provided by the Delegate, I am satisfied that Biothera Clinics failed to comply with the Demand for Records issued by the Director on October 8, 2010, and did not avail itself of the opportunity to provide documentary evidence during the course of the investigation.
23. In *Tri-West Tractor Ltd.* BC EST # D268/96, a party did not provide to the Delegate information which was reasonably available and relevant to the investigation, and it later sought to introduce that information on appeal. The Tribunal wrote as follows:
- 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.
24. The Appellant has not identified a valid reason as to why the evidence was “not available” prior to the time the Determination was being made. An appeal to the Tribunal is not a second opportunity to bring forward the case which should have been presented to the Delegate or an opportunity to have the complaint re-investigated (See *J.P. Metal Masters 2000 Inc.*, BC EST # D057/05; and *MSI Delivery Services Ltd.*, BC EST # D051/06).
25. Biothera Clinics also did not establish that if the evidence now submitted on appeal were considered, the Delegate could have reached a different conclusion in the Determination. The information contained in the witness statements, which were not given under oath or solemn affirmation, would fall short of establishing that the termination was for just cause. The time sheets reflected only the latter period of Ms. Eisenzimmer’s employment; and were not records of the actual wages paid to her. I note that Ms. Eisenzimmer maintained that the time sheet documents submitted by Biothera Clinics were not the time sheets she had prepared. The information in the time sheets would be insufficient to establish that there was an error in the Determination concerning the outstanding vacation pay.
26. In summary, the request for an extension of time to file the appeal is dismissed. In any event, the Appellant failed to meet the onus of proving that an appeal should be allowed based on the ground of new evidence that was not available at the time the Determination was made, as set out in section 112(c) of the *Act*. The appeal is dismissed.

ORDER

27. Pursuant to section 114 of the *Act*, I order the appeal dismissed and the Determination dated December 2, 2010 against 0826765 BC Ltd. carrying on business as Biothera Clinics confirmed together with any interest that has accrued under section 88 of the *Act*.

Carol-Ann Hart
Member
Employment Standards Tribunal