

An application for suspension

- by -

Puzzled Looks Optical (Capilano) Ltd.
("PLO")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

Pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: Robert C.P. Walker

FILE No.: 2012A/25

DATE OF DECISION: May 1, 2012

DECISION

SUBMISSIONS

D. Michael Briard	on behalf of Puzzled Looks Optical (Capilano) Ltd.
Cydney Harling	on her own behalf
Terry Hughes	on behalf of the Director of Employment Standards

OVERVIEW

1. Puzzled Looks Optical (Capilano) Ltd. (“PLO”) has appealed a Determination of the Director of Employment Standards (the “Director”) issued February 10, 2012, ordering it to pay overtime pay, annual vacation pay, and accrued interest to Cydney Harling (the “Respondent”) in the amount of \$580.40. Further administrative penalties totalling \$1,500.00 for contraventions of sections 40 and 58 of the *Employment Standards Act* (the “Act”) were also imposed.
2. PLO appealed the Determination on March 7, 2012, arguing the Director failed to observe the principles of natural justice because a scheduled hearing proceeded in the absence of PLO’s representative Mr. Briard. He was caught in traffic while travelling from Abbotsford and was an hour late. PLO also argues that the Director misconstrued the work schedule of the Respondent and that no overtime should have been payable and the Respondent had received pay in kind by the receipt of new glasses shortly before she left employment.
3. PLO also sought a suspension of the Director’s Determination pending consideration of the appeal
4. This decision addresses only the suspension request.

FACTS AND ARGUMENT

5. A mediation took place in August 2011 but to no avail. Subsequently the Director demanded but did not receive payroll records from PLO prior to the scheduled Hearing on February 2, 2012. PLO was to have delivered them by January 10, 2012. Mr. Briard advised an officer of the Employment Standards Branch on January 31, 2012, that he would be bringing them to the hearing on February 2, 2012. The Branch had originally suggested a teleconference adjudication hearing but at the behest of Mr. Briard decided to hold a hearing in person at the LRB in Vancouver.
6. On the hearing date the Delegate of the Director waited a half hour after the scheduled time for a representative of PLO to attend. No one attended and no messages were received that they were in transit. There is no indication in the Reasons for the Determination whether Mr. Briard did attend “one hour later”.
7. The Delegate commenced and concluded the hearing only in the presence of the Respondent. His Reasons were dated February 10, 2012. The substance of his Determination is set out in paragraph 1, above.
8. PLO submits that it did not receive natural justice at the February 2, 2012, hearing as the Director did not give PLO an opportunity to participate. He submits further that the methodology used by the Director in calculating whether overtime (and associated vacation pay and interest) is payable was faulty because the

Director made calculations based upon the “traditional Sunday through Saturday” work week but all employees (including the Respondent) at PLO are agreeable to and subject to work week calculations from Monday through Sunday. If that work week is used then no, or less, overtime is payable. Finally PLO submits that a pair of glasses valued at \$900 was ordered and received by the Respondent shortly before she left employment and this pair of glasses was accepted by her in lieu of overtime pay. Presumably the arguments would have been made by PLO’s representative but for his non-attendance.

ANALYSIS

9. Section 113 of the *Act* provides as follows:
 - 113 (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.
 - (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
 - (a) the total amount if any, required to be paid under the determination or,
 - (b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.”
10. On this preliminary application it is not my function to conduct an extensive analysis of the merits of the appeal. The Tribunal will not suspend the effect of a determination in circumstances where the grounds of appeal are frivolous or have no apparent merit; however it may suspend where the appeal may have some merit. (*Tricom Services Inc.*, BC EST # D420/97; *TNL Paving Ltd.*, BC EST # 397/99).
11. The Director makes no objection to a suspension. The Respondent has not specifically addressed the suspension issue but has noted that the hearing began at 10:30 AM and lasted approximately 90 minutes. One wonders why Mr. Briard could not have attended if he was “an hour late”.
12. I cannot say that PLO’s arguments are frivolous or have no apparent merit. There may be some merit as to why PLO was denied natural justice; or whether the Tribunal might recalculate the amount that may be owing having regard to a different work week analysis, or a credit for glasses.
13. PLO has submitted that any payment or collection would cause harm in the operation of the business as it is a small business barely able to carry on in this economy. There are two directors of the company who may be personally liable for payment of portions of the Determination but there is no indication of the financial harm to either director if a suspension is not granted. The Respondent did not indicate whether financial harm would be suffered if payment was not immediately made.
14. I have considered the merits of the Appellant’s appeal and the various submissions. I am prepared to exercise my discretion under section 113(2) of the *Act* to suspend the Determination under certain conditions.

ORDER

15. I Order that the Determination be suspended, pending the outcome of the appeal, provided PLO pays and delivers to the Director of Employment Standards the total amount owed under the Determination dated February 10, 2012, by no later than May 15, 2012, at 4 PM. Payment shall be made by certified cheque or money order to the Director of Employment Standards, PO Box 9570 Stn Prov Govt, Victoria B.C., V8W 9K1.

Robert C.P. Walker
Member
Employment Standards Tribunal