

An appeal

- by -

06977655 B.C. Ltd. carrying on business as The Rocking Horse Pub
(“Rocking Horse”)

- 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 L. Roberts

FILE No.: 2013A/10

DATE OF DECISION: April 16, 2013

DECISION

SUBMISSIONS

Karin Willoughby

on behalf of 06977655 B.C. Ltd. carrying on business as The Rocking Horse Pub

OVERVIEW

1. This is an appeal by 06977655 B.C. Ltd. carrying on business as The Rocking Horse Pub (“Rocking Horse”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued January 15, 2013. In that Determination, the Director ordered Rocking Horse to pay its former employee, Niki M. Gray, \$310.20 in compensation for length of service and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for Rocking Horse’s contravention of section 46 of the *Employment Standards Regulation* (the “*Regulation*”) and section 63 of the *Act*, for a total amount payable of \$1,310.20.
2. Rocking Horse appeals the Determination contending that the delegate failed to comply with principles of natural justice in making the Determination.
3. I find the matters raised in this appeal can be decided based on Rocking Horse’s written submissions, the Section 112(5) “record” that was before the delegate at the time the decision was made, the Determination, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Ms. Gray worked as a server/bartender at Rocking Horse from December 8, 2011, to March 26, 2012. On May 8, 2012, Ms. Gray filed a complaint with the Employment Standards Branch alleging that her employment had been terminated without just cause.
5. On November 7, 2012, the Branch sent Rocking Horse a Notice of Hearing and Demand for Employer Records by registered mail. The Demand required records to be produced no later than December 3, 2012. Rocking Horse did not produce any records.
6. The Director held a hearing into Ms. Gray’s complaint on December 17, 2012. Briefly, the facts as set out by the delegate are as follows.
7. Ms. Gray said that she advised her employer that she had a medical appointment on March 27, 2012, and asked not to be scheduled for work on that day. On March 26, 2012, Ms. Gray discovered that she had been scheduled to work at the time of her medical appointment and telephoned Ms. Willoughby, one of the directors of Rocking Horse, to tell her that she would be unable to work her shift. According to Ms. Gray, Ms. Willoughby told her that she needed to come in. Ms. Gray replied “no”. Ms. Willoughby said she was not prepared to talk to Ms. Gray and hung up the telephone. Ms. Gray was unsuccessful in finding another employee to cover her shift. She attended her medical appointment and she showed up intending to work the last half of her shift. When she arrived, the bartender told her that Ms. Willoughby said that Ms. Gray was no longer employed at Rocking Horse and that her evening shift had been filled by someone else. Ms. Gray also said she had only received one prior warning from Rocking Horse, and that was about not rolling silverware at the end of her shift.

8. Ms. Willoughby contended that Ms. Gray stole from her employer and gave her friends free food and wine. When asked if she would provide evidence to support her assertions, Ms. Willoughby said that she would not do so until “it gets serious”. The delegate reminded Ms. Willoughby that the *Act* and the *Regulation* contraventions were serious matters and mandated monetary penalties. According to the delegate, Ms. Willoughby accused all employees of the Employment Standards Branch of being biased against employers and said that she would appeal any Determination finding wages owing to Ms. Gray. Ms. Willoughby said that she had a customer who saw Ms. Gray give away wine, but when asked if she was intending to call that person as a witness, Ms. Willoughby said that she was not.
9. Ms. Willoughby acknowledged that she had received the Demand for Employer Records but said that she had not read it all.
10. The delegate found that Rocking Horse had not established just cause to end Ms. Gray’s employment. The delegate accepted Ms. Gray’s evidence in its totality, stating that he found it had been given in a “forthright and careful fashion”.
11. The delegate found that it was impossible to precisely calculate Ms. Gray’s entitlement to compensation for length of service in the absence of employer records. The delegate accepted Ms. Gray’s account based on her last four pay statements.
12. Rocking Horse contends that the Determination was made “with prejudice”. Ms. Willoughby also says, among other things, the following:
 - Ms. Gray did not produce a doctor’s note “to proof that was the reason for failing to turn up for her shift on Wednesday 28th March 2012. These are grounds for dismissal without severance pay”;
 - Ms. Gray had “numerous warnings of different issues followed by a written warning” [reproduced as written]

ANALYSIS

13. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was made.
14. Section 115 of the *Act* states that after considering whether the grounds of appeal have been met, the tribunal may, by order:
 - (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.
15. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.

16. Although Rocking Horse's grounds of appeal is that the Director failed to observe the principles of natural justice, there is nothing in either the submissions or in the record that supports this ground of appeal.
17. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
18. Rocking Horse contends that the Determination was made "with prejudice". I infer that Rocking Horse believes that the delegate was biased against it. However, there is nothing in the submission that explains why Ms. Willoughby feels the way she does. A mere assertion of bias, without any foundation, is not enough for me to conclude that the delegate was biased against the Employer. Furthermore, the mere fact that the delegate found against Rocking Horse is an insufficient basis for me to find, or infer, that the delegate was not impartial.
19. I am satisfied that Rocking Horse was provided with information on the hearing process, the law and the issues in dispute as well as significant guidance on its obligation to provide Records as required by the Demand. I am also satisfied that Rocking Horse failed or refused to participate meaningfully in the hearing, by not producing documents in response to a Demand for employer records and by not calling witnesses although given the opportunity to do so.
20. Rocking Horse's submission appears to be a restatement of the position it took before the delegate. As the Tribunal has repeatedly stated, an appeal is not an opportunity for an appellant to present evidence that ought to have been provided to the delegate during the investigation nor is it an opportunity to re-argue a dispute that has already been argued before the delegate.
21. Although the delegate's reasons are extremely brief, there is nothing in the appeal submission that persuades me that his conclusion is wrong in law.
22. I cannot find that Rocking Horse has shown the Delegate failed to observe the principles of natural justice.

ORDER

23. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination, dated January 15, 2013, be confirmed in the amount of \$1,310.20 together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal