

An appeal

- by -

Ana David

- 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

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2004A/6

**DATE OF DECISION:** March 16, 2004

## DECISION

### SUBMISSIONS

Ada David:	On her own behalf
Simon Shair	On behalf of Nutrition House
Lynne Egan:	On behalf of the Director of Employment Standards

### OVERVIEW

This is an appeal by Ada David, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued January 13, 2004.

Ms. David filed a complaint with the Director alleging that 575437 B.C. Ltd. operating as Nutrition House ("Nutrition House") contravened the Act by failing to pay sufficient compensation for length of service. Ms. David also alleged that Nutrition House terminated her employment because of her pregnancy.

The Director's delegate concluded that Ms. David was not entitled to any further wages as compensation for length of service. Because Ms. David has also filed a complaint with the Human Rights Tribunal that her employment had been terminated because of her pregnancy, the delegate ceased investigating the complaint under section 76(3)(f) of the Act.

### ISSUE TO BE DECIDED

1. Did the Director's delegate err in law in ceasing her investigation of Ms. David's complaint?

### FACTS

Ms. David worked for Nutrition House as an assistant manager from October 2, 2001 until May 3, 2002. She was re-hired May 16, 2002 and terminated on March 7, 2003. She was given one week's wages as compensation for length of service. Ms. David abandoned her claim for additional compensation before the delegate.

In addition to filing a complaint under the Act, Ms. David also filed a complaint under the *Human Rights Code* (R.S.B.C. 1996, C. 210). Ms. David's hearing was set to be heard March 29, 30 and 31, 2004.

Nutrition House advised the delegate that Ms. David was fired for reasons related to her performance, not her pregnancy.

In the Determination itself, the delegate concluded that the Act had not been contravened. However, in the Reasons for the Determination, the delegate made two separate decisions. The first decision was to dismiss Ms. David's complaint that she was entitled to compensation for length of service. The delegate

found that Ms. David had been paid all the wages she was entitled to. Ms. David did not appeal this aspect of the decision.

The second decision the delegate made was to cease investigating Ms. David's complaint that her employment had been terminated because of her pregnancy under section 76(3)(f) of the Act because Ms. David had filed a human rights complaint on the same grounds.

## ARGUMENT

Ms. David contends that "no investigation on my complaint took place to validate the facts. Employer lies continuously on reason for termination".

Ms. David submits that her Record of Employment (ROE) set out the reason for her termination as lack of work. She says that the reason was incorrect, since her position was taken away to be given to another employee.

Ms. David makes no submissions on how the delegate erred in law in her interpretation or application of section 76(3)(f) of the Act.

The delegate submits that Ms. David does not dispute that she commenced another action under the *Human Rights Code*, or that the subject of her complaints relates to the subject matter of her Employment Standards complaint. Therefore, she submits that the appeal should be dismissed.

## ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made

Section 76(3) of the Act provides that

the Director may refuse to accept, review, mediate, investigate or adjudicate a complain to or may stop or postpone reviewing, mediating, investigation or adjudicating a complaint if

...

- (f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediation.

This section is substantially similar to s. 76(2)(e) of the Act prior to its amendment.

Section 76 allows the Director the discretion to refuse to investigate or to stop or postpone an investigation in certain circumstances. The extent to which, and under what circumstances, the Tribunal

will review that exercise of discretion was set out in *Re Jody L. Goudreau and Barbara E. Desmarais, employees of Peace Arch Community Medical Clinic Ltd.* (B.C.E.S.T. #D066/98):

The Tribunal will not interfere with that exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

... a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”.

**Associated Provincial Picture Houses v. Wednesbury Corp.** [1948] 1 K.B. 223 at 229

The burden is on Ms. David to demonstrate that the delegate’s exercise of discretion to cease investigating her complaint was unreasonable. Ms. David has not met that burden.

There is no dispute that Ms. David had filed a human rights complaint. The delegate had the authority, under these circumstances, to stop her investigation. The arguments advanced by Ms. David on appeal relate to the substance of the complaint, not the reasons for the decision. After reviewing the delegate’s decision, I find no basis to interfere with the delegate’s exercise of discretion.

The appeal is dismissed.

## **ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination dated January 13, 2004 be confirmed.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**