

An appeal

- by -

Great Canadian Bingo Corp.  
("GCB")

- 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.:** 2006A/25

**DATE OF DECISION:** April 12, 2006

## DECISION

### SUBMISSIONS

John Davis, Scarlett Manson Angus                      on behalf of Great Canadian Bingo Corp.  
Amanda Clark Welder    on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Great Canadian Bingo Corp. (“GCB”), 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, 2006.
2. Jacquie Bauer worked as an administrative assistant for her husband, David Bauer, GCB’s Director of Operations, from January 2003 until September 2003. Ms. Bauer filed a complaint alleging that she was owed regular wages, annual vacation pay and compensation for length of service.
3. Following an investigation, the delegate determined that GCB had contravened Sections 18 and 63 of the *Employment Standards Act* in failing to pay Ms. Bauer wages, vacation pay and compensation for length of service. She concluded that Ms. Bauer was entitled to wages and interest in the total amount of \$2,134.13. The delegate also imposed a \$1,000 penalty on GCB for the contraventions, pursuant to section 29(1) of the *Employment Standards Regulations*.
4. GCB says that it sought an oral hearing during the course of the Determination in order that it could cross examine Ms. Bauer, and that the request was refused. GCB contends that this constituted a failure to observe the principles of natural justice in making the Determination and seeks to have it cancelled
5. Although GCB sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties. In arriving at my decision, I have reviewed the submissions of the parties, the section 112(5) “record”, and the Reasons for the Determination.

### ISSUE

6. Did the delegate fail to observe principles of natural justice by failing to conduct an oral hearing, depriving the employer of the right to challenge the employee’s evidence?

### ARGUMENT

7. GCB says that the adjudicator based her Determination on findings of credibility in favour of Ms. Bauer over GCB’s evidence without GCB having any opportunity to test Ms. Bauer’s credibility in cross examination. It further submits that when it requested an oral hearing, the adjudicator said that no oral hearing would be held for reasons of policy, and that if a party was dissatisfied with the decision, an oral hearing with cross examination of witnesses would take place at the appeal level.

8. The delegate says that the *Act* contemplates a variety of dispute resolution methods including mediation, adjudication and investigation, and that the Director has the discretion to decide which method will be used in any particular complaint. She says that the considerations for deciding to conduct an investigation rather than an oral hearing were the fact that Mr. and Mrs. Bauer had both filed complaints and had subsequently relocated outside the lower mainland, and GCB no longer had any ongoing operations in the province. She further submits that GCB was notified of the case against it and the opportunity to respond to it and all information gathered during the course of the complaint.
9. The delegate further says that there was “ample documentary evidence provided by the parties that was considered in the assessment of credibility”. She submits that GCB has failed to provide evidence to support the conclusion that the inability to cross-examine Ms. Bauer would have led to an alternate conclusion, and seeks to have the appeal dismissed.
10. In reply, counsel for GCB says GCB “was not fully aware” of the case against it, and was not able to test that case by way of cross examination. As an example, counsel says that it was unaware Ms. Bauer had advised the delegate that all property of the company had been returned to it, evidence it denies. It submits that the evidence must be tested on cross examination.

## FACTS

11. The relevant facts as set out by the delegate are as follows.
12. GCB, which was registered in the province of Saskatchewan, was a wholly owned subsidiary of Dion Entertainment Corp. (“Dion”), which had operations in the lower mainland. Ms. Bauer’s husband, Dwayne Bauer, was a director/officer of GCB and GCB’s Director of Operations in Saskatchewan. He continued to work for GCB from Dion’s offices when he and Ms. Bauer moved to British Columbia in 1996.
13. David Wallace was the sole director and officer of D.A.W. Investments Ltd. (“DAW”), which was a secured creditor of Dion. In November, 2002, Mr. Wallace became the sole director/officer of GCB under the terms of a security agreement between DAW and Dion, and in December, DAW appointed a receiver/manager of Dion under the security agreement. Dion’s Surrey offices were closed, and Dion filed for bankruptcy in November 2003. GCB continued to operate under the control and direction of David Wallace, and Mr. Bauer continued to work for GCB from his home under Mr. Wallace’s direction.
14. GCB paid Ms. Bauer a monthly salary from January 2003 until September 2003, from which statutory deductions were taken. The payroll records did not show that annual vacation pay was paid on the wages.
15. The documents disclosed that Mr. Wallace attempted to obtain information regarding Ms. Bauer’s relationship with GCB, and that he felt Mr. Bauer was refusing to address the situation. By way of a letter dated September 24, 2003, copied to Mr. Bauer, Mr. Wallace instructed GCB’s general manager, Terry Pylatuk, to immediately stop payments to her.
16. Ms. Bauer indicated that she was notified that her employment had been terminated when her September 25, 2003 paycheque was stopped. GCB issued Ms. Bauer a Record of Employment on January 24, 2004.
17. Although GCB acknowledged that its records indicated that Ms. Bauer was an employee, it took the position before the delegate that no wages were owed to her because she was not legitimately employed.

18. It submitted that Ms. Bauer did not provide any services or perform any work for GCB, and that she and Mr. Bauer attempted to fraudulently conspire against GCB. In support of this argument, GCB provided the delegate with documents originally prepared for an appeal of a CCRA decision finding GCB had hired Ms. Bauer under a service contract. These documents included statutory declarations from David Wallace and Terry Pylatuk, as well as other employees of GCB and Dion.
19. In the statutory declaration, Mr. Wallace swore that he had informed Mr. Bauer that he no longer had any authority to manage the business, and that he was to not to hire or fire any employees without his approval. His declaration further stated that, after repeated requests, Mr. Bauer acknowledged that he could not provide him with any evidence Ms. Bauer was working on something of benefit to GCB. According to Mr. Wallace's declaration, Mr. Bauer further admitted that he had taken a pay raise and put it in Ms. Bauer's name for tax purposes.
20. Mr. Wallace further declared that there was no business need for Ms. Bauer's employment.
21. In his statutory declaration, Mr. Pylatuk stated that Mr. Bauer spoke to him in January 2003 to advise him that he was putting Ms. Bauer on the payroll as she was going to assist him to lobby the government regarding proposed changes to gaming legislation. According to the declaration, Mr. Bauer further advised Mr. Pylatuk that he would be reducing his own salary and that hiring Ms. Bauer was to assist with their tax situation.
22. Mr. Pylatuk declared that from January to September 2003 he did not see any evidence that Ms. Bauer was performing any services for the company.
23. GCB also submitted that Ms. Bauer took time off with pay in excess of the minimum requirements of the Act, and provided copies of Mr. Bauer's cellular phone records for the period January 6, 2003 to October 4, 2003. It contended that these records demonstrated that the Bauers were travelling and not engaged in company business for a total of 45 business days.
24. Finally, GCB contended that Ms. Bauer's fraudulent behaviour constituted cause for her dismissal. It says that, upon Mr. Wallace becoming aware that Ms. Bauer was on the company's payroll, he gave Mr. Bauer an opportunity to explain Ms. Bauer's employment. Mr. Wallace terminated her employment when it finally became clear to him she was doing no work. GCB submitted that it provided Ms. Bauer with an ROE because it had a statutory obligation to do so since she had been on the payroll.
25. Ms. Bauer contended that she was legitimately employed, and provided a copy of CCRA rulings finding that she was an employee. She says that when Dion closed its office in December 2002, Mr. Bauer lost administrative support services, and she provided those as and when Mr. Bauer needed. She advised the delegate that she worked an average of 30 hours per week.
26. Both Mr. and Ms. Bauer contended that Mr. Wallace was aware of Ms. Bauer's employment from the outset.
27. Ms. Bauer advised the delegate that she did not have any records of work performed because she sent all the records back to GCB's offices in Saskatchewan. She said she was not paid for work performed from September 11 to 24<sup>th</sup>.

28. Ms. Bauer also denied that she took vacation time off with pay, and that many cellular calls were made when Mr. Bauer was away on business.
29. Finally, Ms. Bauer submitted that she was not given notice of termination, and denied that GCB had cause for terminating her employment. She stated that Mr. Wallace never questioned her employment until the letter of September 24, 2003 instructing that all payments be stopped.
30. The delegate preferred Ms. Bauer's evidence about the nature of the parties' relationship over that of GCB. She found internal inconsistencies in Mr. Wallace's declaration, primarily with respect to his knowledge of Ms. Bauer's employment. She noted that although Mr. Wallace declared that he did not learn about Mr. Bauer's decision to hire Ms. Bauer until May, 2003, his September 2003 letter to Mr. Pylatuk stated that he had been attempting to sort out Ms. Bauer's employment with Mr. Bauer since February 2003. The delegate concluded that whether Mr. Wallace learned about Ms. Bauer's employment in February or May, a reasonable person would expect that would have dealt with Mr. Bauer's insubordination immediately. She also found that a reasonable person would have terminated both Mr. and Mrs. Bauer's employment in September when Mr. Bauer admitted he was unable to produce evidence of Ms. Bauer's work and acknowledged her employment was an attempt to split his income.
31. The delegate further noted that, in any event, Mr. Wallace allowed Ms. Bauer to remain on the company payroll as an employee after becoming aware of her employment.
32. The delegate also questioned Mr. Pylatuk's behaviour in not reporting Mr. Bauer for giving himself a raise by way of income splitting.
33. The delegate concluded that Ms. Bauer was an employee of GCB. She further determined that GCB had the obligation under s. 28 of the *Act* to maintain records of Ms. Bauer's hours of work, and its failure to do so did not establish that Ms. Bauer did not perform work for which wages were owed. She also found that Ms. Bauer performed work from September 11 to 24, 2003 since the wage statement was prepared for this period, and not paid only because Mr. Wallace instructed Mr. Pylatuk not to process any further payments. She found GCB in contravention of s. 18 by failing to pay wages within 48 hours of the date of Ms. Bauer's termination.
34. The delegate determined that the payroll records did not indicate that vacation pay had been paid. She determined that Mr. Bauer's cellular telephone records did not prove that Ms. Bauer had taken time off with pay, and concluded that Ms. Bauer was entitled to annual vacation pay.
35. Finally, the delegate concluded that GCB had not discharged the burden of establishing that Ms. Bauer's employment had been terminated for cause. She determined that GCB's evidence did not establish that Mr. and Ms. Bauer were engaged in a fraud. She concluded that, had GCB believed it had just cause to terminate Ms. Bauer's employment, it would also have terminated Mr. Bauer's employment. She noted that GCB had not established performance standards for Ms. Bauer, nor had it ever warned her that her performance was in question. She determined that Ms. Bauer was entitled to compensation for length of service.

## ANALYSIS

36. Section 112(1) of the *Act* provides that a person may appeal a determination on the grounds that the director failed to observe the principles of natural justice in making the determination.

37. The burden of establishing the grounds for an appeal rests with an Appellant. GCB must provide persuasive and compelling evidence that the delegate failed to observe the principles of natural justice.
38. Natural justice, or fairness, is a procedural right which provides that a party has the right to know the case against them, the opportunity to dispute, correct or contradict anything which is prejudicial to their positions, and to present arguments and evidence supporting their own case.
39. Fairness is defined by common law as well as statutory principles. As the delegate correctly points out, section 77 of the *Act* provides that if an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.
40. However, that does not completely address the question of what factors or criteria are to be considered when the Director decides whether to hold an oral hearing rather than conduct an investigation.
41. As noted in *Kyle Freney* (BC EST #D130/04), in the past the Director investigated all complaints. It continues to do so in some cases, and in others, it conducts an adjudicative process. The Director exercises a discretion as to what process is followed in each particular case.
42. In determining whether one process or another is appropriate, factors such as whether the process contemplated is adequate or whether it will impede the participants' ability to sufficiently know the case to be met and to present their case must be considered. As Macaulay and Sprague note, the key to evaluating the procedural content of a hearing is to determine whether or not the available procedures facilitate or frustrate the opportunity for an informed and effective presentation of a party's case to the tribunal involved:

At common law, there is no absolute obligation on agencies to allow cross examination of witnesses in oral hearings or to allow cross-examination on the materials submitted or interlocutories when the hearing is conducted in writing. The only right which the rules of procedural fairness guarantee to parties is the right to rebut opposing evidence and to correct or contradict prejudicial statements. If this can be achieved without recourse to cross-examination, then parties appearing before a tribunal are not entitled to it. The key is whether cross examination is the only effective method open to a party to answer the case made against it. As such, the availability of cross-examination as a matter of right, as with all other procedural requirements at common law, will largely depend upon the circumstances of the individual case and upon the nature of the particular tribunal involved. (*Hearings Before Administrative Tribunals* (Toronto: Carswell, 1995) at p. 12-173)

43. I am not persuaded, in all of the circumstances, that the delegate failed to observe the principles of natural justice.
44. GCB was aware that Ms. Bauer was claiming wages, compensation for length of service and vacation pay. The burden was on GCB to refute that claim. It did so by providing the delegate with a variety of documents including statutory declarations from its officer/director and senior personnel.
45. In my view, there was sufficient documentary evidence before the delegate to support a conclusion that Ms. Bauer was an employee and entitled to wages and compensation for length of service. There were no serious issues of credibility to be decided, as GCB's documentation corroborated much of Ms. Bauer's claims. That documentation established that Ms. Bauer was an employee, and that she had been paid wages. The statutory declarations of both Mr. Wallace and Mr. Pylatuk confirm that they knew Ms. Bauer

was claiming to perform work. In Mr. Pylatuk's case, he knew of Ms. Bauer's employment since January 2003. As GCB's general manager, he presumably had authority to terminate Ms. Bauer's employment had he been concerned about the veracity of her claim to be performing work; certainly he had the ability to convey this information to Mr. Wallace. I am not persuaded that, had GCB been afforded the opportunity to cross-examine Ms. Bauer, the delegate's conclusion on this point would have been any different.

46. GCB provided the delegate with insufficient evidence that it had just cause to terminate Ms. Bauer's employment. It has provided no compelling evidence or reasons on appeal how the delegate's conclusion was in error, or how an oral hearing would have led the delegate to a different conclusion on this issue. Furthermore, it has provided no evidence or reasons why the delegate's refusal to hold an oral hearing impeded its ability to respond fully to Ms. Bauer's claim that she was entitled to compensation for length of service.
47. Although GCB claims that it would have refuted Ms. Bauer's claim that she returned all GCB property to its head office, nothing in the delegate's decision turns on that point. GCB has not identified any other evidence that it did not have knowledge of, or had inadequate opportunity to respond to.
48. In summary, GCB has not established that it was necessary to conduct an oral hearing to make findings of fact on competing evidence that was essential to making a determination on the claims made by Ms. Bauer, and I dismiss the appeal.

## **ORDER**

49. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated January 13, 2006, be confirmed in the amount of \$3,134.13, plus whatever interest might have accrued since the date of issuance.

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