

An appeal

- by -

Puzzled Looks Optical (Capilano) Limited
(“PLO”)

- 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.: 2012A/24

DATE OF DECISION: May 16, 2012

DECISION

SUBMISSIONS

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

OVERVIEW

1. This is an appeal by Puzzled Looks Optical (Capilano) Limited (“PLO”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued February 10, 2012.
2. Cydney Harling was employed as an optician by PLO, an optical business, from February 19, 2010, until February 7, 2011. Ms. Harling filed a complaint with the Director on June 6, 2011, alleging that PLO had contravened the *Act* in failing to pay vacation pay and overtime wages.
3. Following a hearing, the Director concluded that PLO had contravened section 40 of the *Act* in failing to pay overtime wages, section 58 of the *Act* in failing to pay annual vacation pay, and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) for failing to produce employer records. The Director’s delegate determined that Ms. Harling was entitled to wages, vacation pay and accrued interest in the total amount of \$580.40. The Director also imposed three administrative penalties in the amount of \$500 for each of the contraventions, for a total amount payable of \$2,080.40.
4. PLO contends that the Director failed to observe the principles of natural justice in making the Determination and seeks to have it cancelled. PLO also sought a suspension of the Determination. In a Decision issued May 1, 2012, the Tribunal granted the suspension application on the condition that PLO deposit the full amount of the Determination no later than May 15, 2012. (BC EST # D037/12).
5. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This decision is based on the written submissions of the parties.

ISSUE

6. Whether or not the Director failed to observe the principles of natural justice in making the Determination.

FACTS

7. On August 22, 2011, a delegate of the Director attempted to resolve Ms. Harling’s complaint by way of mediation. The mediation was unsuccessful. The Employment Standards Branch (the “Branch”) then attempted to schedule an arbitration hearing by teleconference, but Mr. Briard asked that the matter be dealt with by way of an in-person hearing. On December 13, 2011, the Branch sent a Notice of Hearing to be held at 10:00 a.m. on February 2, 2012. The notice required both parties to provide copies of relevant records to

the Branch by January 10, 2012. The Notice also specified that the Branch adjudicator could make a Determination based on the evidence before them even if the parties chose not to participate at the hearing. The Director also issued a Demand for Employer Records at the same time. The Demand required payroll records to be delivered to the Branch by January 10, 2012.

8. The Notice and Demand were sent by regular and registered mail to PLO's business address as well as the registered offices of PLO's two directors, one of whom is Mr. Briard. Canada Post confirmed the delivery of the registered letter sent to the business. The registered letters sent to the directors were unclaimed. None of the regular mail was returned to the Branch.
9. PLO provided no records in response to the Demand or the Notice. On January 31, 2012, a Branch officer contacted Mr. Briard. Mr. Briard told the officer that he would be attending the hearing on February 2, 2012. When the officer advised Mr. Briard that the Branch had not received any payroll records from PLO, Mr. Briard indicated that he did not have time to send them in. When the officer asked Mr. Briard if he could fax the documents to the Branch in advance of the hearing, Mr. Briard said that he would bring them to the hearing.
10. On the day of the hearing, the delegate waited until 10:30 for a representative from PLO to show, and when no one appeared, the delegate heard evidence from Ms. Harling.
11. Ms. Harling advised the delegate that she worked at PLO's North Vancouver outlet, initially working Fridays and the occasional Saturday. She began working for PLO on a full time basis on August 16, 2010.
12. Ms. Harling provided the delegate with her wage statements and work schedules in support of her claim. She alleged that she worked in excess of 40 hours a week between August 15, 2010, and December 18, 2010, and was not paid any overtime premiums. Ms. Harling explained that she worked a two week cycle that resulted in her working six days one week and four the following week. She claimed 4.5 overtime hours per week for a nine week period. The delegate found Ms. Harling's statements to be supported by copies of some of her work schedules.
13. Ms. Harling also said, and the delegate determined, that she was not paid the full amount of her vacation pay.
14. In the absence of any evidence from PLO, the delegate found that Ms. Harling was entitled to wages as set out above.

ARGUMENT

15. Mr. Briard says that he was one hour late for the hearing because he was caught in traffic. He submits that PLO's work week was from Monday through Sunday, and that based on that schedule, no overtime was worked nor requested by any employee, and that all employees agreed to the schedule. He submits that Ms. Harling ordered glasses and lenses valued in excess of \$900 in lieu of overtime pay and left PLO a few weeks later. He submits that, for these reasons, the Determination should be overturned and all penalties cancelled.
16. The delegate contends that the Determination speaks for itself. She also says that the hearing began one half hour after it was scheduled to start and that it ended at approximately noon. She says that the hearing room and hearing information were posted in the lobby and the Board's reception staff was instructed to notify her if the employer appeared. She says that if Mr. Briard appeared at 11:00 am for the hearing that did not end until noon, he did not communicate that to anyone at the Branch. She further says that although Mr. Briard

had several contact numbers for individuals at the Branch, he never made telephone contact with any of them.

17. The delegate says that, although Mr. Briard contends that the employer's work week for overtime is Monday through Sunday, the *Act* defines a week as "a period of 7 consecutive days beginning, for the purpose of calculating overtime, on Sunday." She also notes that the requirements of the *Act* cannot be waived.
18. The delegate submits that Ms. Harling's evidence was that the provision of eyewear was a benefit provided by PLO and that there was never any agreement that eyewear would be provided in lieu of overtime wages. The delegate says that, in any event, if such an agreement existed, it would not comply with the overtime provisions of the *Act*.
19. Finally, the delegate says that PLO makes no submissions regarding vacation pay and has provided no payroll or other records regarding vacation pay earned or paid.
20. The delegate seeks to have the Determination confirmed.
21. Ms. Harling also says that the hearing, which was scheduled for 10:00 am, began at 10:30 am and lasted approximately 90 minutes. She says that she received a pair of glasses as a benefit according to her offer of full time employment, as confirmed by her employment contract, both of which Mr. Briard signed.

ANALYSIS

22. 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.
23. 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.
24. 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. Although PLO alleges a failure to comply with principles of natural justice as the ground of appeal, the written submissions have no bearing on that ground of appeal.
25. I am satisfied that, having participated in a mediation, PLO was aware of the details of the complaint. There is no dispute that PLO was aware of the date and time of the hearing. I am further satisfied that PLO was aware that a failure to appear at the hearing could result in a Determination being made in its absence. Finally, I am satisfied that PLO was aware that it was to submit documents in advance of the hearing and that the Director would make a decision based on the information that was available to the delegate at the time of the hearing.
26. PLO did not provide the required documents in advance of the hearing. There is no evidence Mr. Briard attempted to communicate his traffic difficulties with anyone in the Branch or that he advised any of the staff

that he had arrived at the Branch for a hearing. In fact, Mr. Briard did not attempt to explain his failure to appear at the hearing until he filed his appeal, over one month after he was purportedly caught in traffic.

27. There is no evidence PLO was denied natural justice and I find no basis for PLO's appeal on this basis.
28. PLO's appeal submission advances arguments I infer it would have provided had Mr. Briard indeed appeared at the hearing. The evidence is that the delegate and other Branch officers sought that information from PLO well before the hearing date on several occasions. The Tribunal has long held that a party cannot "sit in the weeds", failing or refusing to participate in a hearing or comply with Demands for records and then file an appeal when they disagree with the resulting Determination. (see *Tri-West Tractor Ltd.* (BC EST # D268/96))
29. Having reviewed the Determination, I am unable to find a basis for interfering with the delegate's conclusions.
30. The appeal is dismissed.

ORDER

31. Pursuant to section 115 of the *Act*, I order the Determination dated February 10, 2012, be confirmed in the amount of \$2,080.40, together with any interest that has accrued under Section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal