Employment Standards TRIBUNAL

An appeal

- by -

Trattoria Pasta Shoppe Ltd.
(the “Appellant”)

- 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: W. Grant Sheard

FILE No.: 2003A/324

DATE OF DECISION: March 17, 2004

DECISION

SUBMISSIONS

Argentino DiCecco	on behalf of the Appellant Employer
Alan Phillips	on behalf of the Director
Daria Masny	the Employee on her own behalf

OVERVIEW

This is an appeal based on written submissions by Trattoria Pasta Shoppe Ltd. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of Determinations issued by the Director of Employment Standards (the "Director") on August 27, 2003 and Decemer 30, 2003 wherein the Director's Delegate (the "Delegate") found that the Respondent was entitled to wages, overtime, compensation for length of service, vacation pay and accrued interest totaling $610.58 plus an administrative penalty payable of $500.00 for a total amount payable by the Appellant of $1,110.58, and that Argentino DiCecco formerly operating as Trattoria Pasta Shoppe is associated with the corporate entity, Trattoria Pasta Shoppe Ltd., that they can be treated as one person and that they are associated entities jointly and separately liable for the wages owed to the complainant pursuant to Section 95(a) and (b) of the *Act*.

ISSUES

1. Did the Director fail to observe the principles of natural justice in making the Determination?
2. Use of new evidence.
3. Did the Appellant have just cause to dismiss the Respondent such that the Respondent was not entitled to notice or compensation for length of service?
4. Did the Director err in finding that the Employer business was carried on by or through an individual proprietor and a corporation under common control or direction?
5. Was the Appellant entitled to an oral hearing?
6. Did the Delegate err in rendering a Determination after a "mediation"?

ARGUMENT

The Appellant's Position

In an appeal form dated September 23, 2003 and a supplementary written submission filed therewith the Appellant states that its grounds for appeal are that the Director erred in law and that the Director failed to observe the principles of natural justice in making the Determination. The Appellant says that the Delegate failed to adhere to the principles of natural justice in failing to allow the Appellant to present his case fairly and efficiently and denying the Appellant an opportunity to present written evidence which

had not been disclosed prior to the Delegate's investigational hearing. Further, the Appellant asserts bias on the part of the Delegate.

In the supplemental written submission the Appellant, in support of its assertion that it had just cause for dismissing the Respondent, presents evidence asserting that the Respondent was altering certain recipes and procedures in this restaurant. The Appellant says the Respondent altered the recipe for iced tea and mocha, and varied from the procedure for the preparation of tea water and greeting of customers.

In a second supplemental written submission dated October 28, 2003 the Appellant reasserts its objection to the imposition of an administrative penalty in respect of a corporation that was incorporated after the Respondent was terminated. The Appellant also complains that the initial complaint form completed and filed by the Respondent dated May 6, 2003 was not provided to the Appellant at the Delegate's investigational hearing insofar as the first three pages of that document were not produced. The Appellant reasserts its initial objection that the Delegate did not accept a single incident which occurred on April 4, 2003 as providing just cause and submits that, once again in the alternative, there was a "build up of issues" that supported a finding of just cause. The Appellant relies on the case of *Isle Three Holding Ltd. operating as Thrifty Foods* BCEST #D19/02 in support of its submission in this regard.

The Appellant also objects to this adjudication having been held by telephone with a single phone having been used saying the Appellant "was not able to hear or question any testimony during certain moments of the hearing". The Appellant again requests an oral hearing. In a final submission in this second supplemental submission the Appellant says that a telephone mediation was conducted on July 21, 2003 wherein it was verbally agreed that the Respondent would receive one weeks wages minus any payroll deductions along with providing the Appellant a verbal apology, but within 30 minutes the Respondent changed her mind and refused to sign the necessary documents to conclude this agreement.

In a third and final supplemental written submission the Appellant restates its objection to the corporation being associated to the individual proprietor and produces with that submission documentation from the Municipal, Provincial and Federal governments (being a permit to operate a food services establishment, Canada Customs and Revenue Agency GST Registration, City of Williams Lake business license, and Ministry of Provincial Revenue Consumer Taxation Branch Certificate of Registration) as proof of the corporation as a separate entity from the individual proprietor.

The Respondent's Position

The Respondent did not file a submission with respect to the initial appeal. However, after a preliminary ruling by this Tribunal and further submission of the Appellant, the Respondent filed a written submission dated February 6, 2004 filed February 9, 2004. In that submission the Respondent says as follows:

> "This establishment was/is still being operated under Mr. DiCecco's direction as sole director. In addition to that, the establishment was already known for and operating as a restaurant/housewares retail operation months before it ever registered and became a corporation under Mr. DiCecco's authority. Nothing in the business changed nor did the individual running and supervising it change."

The Respondent submits that there was no error made in the Determinations of the Delegate and the individual proprietor and corporation ought to be responsible for wages owed.

The Delegate's Position

In a written submission dated October 14, 2003, the Delegate responded to the Appellant's assertion that the Delegate did not adhere to the principles of natural justice.

Regarding the assertion that the Appellant was not allowed to enter evidence at the hearing held on August 3, 2003 and told "no more evidence would be permitted", the Delegate says that the Appellant was advised prior to that hearing that he was required to submit any written evidence to the branch in advance of the hearing and that this evidence would also have to be disclosed to the Complainant. The Delegate says that the Appellant provided no written documentation of the Complainant's disciplinary history prior to the hearing (such as documentation of verbal and written warnings). The Delegate says that the Appellant then appeared to be attempting to introduce new evidence to the Tribunal which, in all likelihood, could reasonably been available prior to that time. The Delegate says that the Appellant's submission concerning the Complainant's apparent unauthorized changes to recipes at the restaurant was not raised as an issue prior to the hearing or during the hearing. Rather the Appellant stated that the basis for the termination of the Complainant's employment was an incident on April 4, 2003 in which the Complainant was insubordinate. The Delegate says that, had the Appellant provided written documentation of the Complainant's disciplinary history (if it existed), and advanced the argument that the actions of the Complainant on April 4, 2003 represented a culminating incident, the conclusion reached in the Determination may have been different.

With respect to the assertion of bias, the Delegate says that in quoting the Complainant's statement that she viewed this matter as "unfortunate" the Delegate simply intended this as an innocuous quotation, and it is not a revelation of bias.

With respect to the administrative penalty the Delegate says that the Appellant was clearly advised prior to the adjudication hearing that if a section of the *Act* was found to be contravened, the Delegate has no discretion or latitude regarding the imposition of a penalty.

THE FACTS

On August 27, 2003 the Director issued a Determination ordering Trattoria Pasta Shoppe Ltd. to pay to the Director $1,110.58 comprised of wages, overtime, compensation for length of service, vacation pay and accrued interest due to the Employee of $610.58 and an administrative penalty of $500.00.

In further reasons for the Determination issued on the same date the Director stated as background to the Determination that Trattoria Pasta Shoppe Ltd. operates a restaurant which falls within the jurisdiction of the *Act*. The Respondent was employed as a server from March 27, 2000 to April 4, 2003 at the rate of pay of $8.00 per hour. The complainant worked 24 hours per week. The Employer terminated the employment of the complainant.

The complaint was filed May 9, 2003 against the individual Argentino DiCecco (Trattoria Pasta Shoppe). The corporate Appellant was incorporated on April 29, 2003 with Argentino DiCecco as the sole director. The original Determination and the reasons for that Determination were silent with respect to any finding that the corporation and Argentino DiCecco carrying on business as Trattoria Pasta Shoppe were or are associated.

On December 16, 2003 this Tribunal referred this matter back to the Director to further investigate the association between Argentino DiCecco doing business as Trattoria Pasta Shoppe and the corporation Trattoria Pasta Shoppe Ltd. In a supplemental Determination dated December 30, 2003 the Delegate found that Argentino DiCecco operated the Trattoria Pasta Shoppe (a proprietorship) prior to the incorporation of Trattoria Pasta Shoppe Ltd. on April 29, 2003. A BC Online Companies-Corporate search (dated December 23, 2003) shows that as of December 9, 2003 Argentino DiCecco was the sole principal of Trattoria Pasta Shoppe Ltd. The Delegate found that Argentino DiCecco operated the business as a proprietorship prior to incorporation and the limited company (Trattoria Pasta Shoppe Ltd.) currently operates under the control and direction of Argentino DiCecco. The ownership of the entities and the ownership of the physical assets of the company were/are vested with one individual: Argentino DiCecco. The operation of the entities are not integrated because the existence of the restaurant as a proprietorship ended when the business became incorporated on April 29, 2003. The day-to-day operation of both the proprietorship and the limited company, including the director of employees was/is undertaken by Argentino DiCecco. The Delegate found that the individual and company are associated and can be treated as one person and that they are jointly and separately liable for wages owed to the complainant as identified in the Determination of August 27, 2003 pursuant to Sections 95(a) and (b) of the *Act*.

In the original Determination of August 27, 2003 the Delegate found that there was little disagreement between the parties with respect to an incident which occurred on the Respondent's last day of work on April 4, 2003. The Respondent was then attempting to prepare a meal for herself following the completion of her shift and the Employer felt that it was not a good time for her to be doing that. The situation escalated to the point where the Complainant was sent home and her employment was terminated the next day.

The Delegate received written witness statements with respect to this incident as presented by the Employer. These witnesses were Candice LaFlamme, another employee, Denise Myra, another employee who was not present on April 4, 2003, Carol DiCecco, present at the worksite on April 4, 2003, and Natalie Kost, also present on April 4, 2003.

The Delegate found that the Appellant had not demonstrated that there was just cause to terminate the Respondent's employment. The Delegate stated that the incident appeared to be one of miscommunication between the Employer and Employee and that, at the time the Employee was sent home the Employer had not terminated her employment stating that his initial intent was to suspend, not to terminate. The Delegate found that the Respondent's behaviour was not one of gross insubordination and that the Employer did not otherwise have just cause through progressive discipline.

In its written submission with the appeal form dated September 23, 2003 the Appellant says that the Respondent had in the year 2002 altered certain recipes and procedures in preparation of the service for the restaurant. The Appellant says he had a verbal conversation with the Respondent and instructed her to stop altering the way these things were done. The Appellant says that on January 8, 2003 it was once again brought to the attention of the Respondent that she was once again altering certain recipes and the Appellant verbally warned her "she was in jeopardy of employment at Trattoria". On another occasion the Respondent was once again seen committing the exact same deliberate infraction and on January 11, 2003 "I told Ms. Masny that this could not go on and to comply with the proper carrying out of her work task". Once again in March 2003 I was informed that the Respondent was once again "manipulating the same procedures" and on March 11, 2003 the Employer informed her that "that was her final nail in her

coffin and that there was no way she would be able to carry on with her employment if she did not comply to company policies".

In its written submission, the Appellant itemizes the procedures and recipes which the Respondent was failing to adhere to. These were the recipes for making iced tea and mocha and the procedure for acquiring tea water and greeting of customers.

ANALYSIS

In an appeal under the *Act* the burden rests with the Appellant, in this case, the Employer, to show that there is an error in the Determination such that the Determination should be cancelled or varied.

1. Did the Director fail to observe the principles of natural justice in making the Determination?

Natural justice may require or consist of many things, but at a bare minimum the parties must be given an opportunity to present evidence, question the evidence of the opposing party litigant and make a submission to the adjudicating body with respect to what it ought to find (see *re Rudowski*, [2000] BCESTD #476 (QL), (9 November 2000), BCEST #D485/00 (Love, Adj.); reconsideration of BCEST #D316/00.).

I do not find that the Delegate quoting the Complainant as saying that it was "unfortunate it had to come to this" demonstrates bias on the part of the Delegate.

With respect to the failure of the Delegate to allow the Appellant to present further documentary evidence at the investigational hearing held August 3, 2003 the Delegate says that the Appellant was clearly advised prior to the hearing that he was required to submit any written evidence to the Branch in advance of the hearing and that this evidence would also have to be disclosed to the Complainant. The Delegate found in the Determination that the Appellant provided no written documentation of the Complainant's disciplinary history prior to the hearing (such as documentation of verbal and/or written warnings). Thus, it does not appear that the Delegate did prevent the Appellant from leading evidence with respect to the failure to adhere to recipes and restaurant procedures. Nonetheless, I will address this issue further under the next heading, the "Use of New Evidence".

The Appellant's objection to the investigational hearing having been held by telephone and his assertion that he "was not able to hear or question my testimony during certain moments of the hearing" is also an issue to be dealt with under the rubric of natural justice. There is no indication from the Appellant as to the nature of the evidence being heard or context of the hearing when this allegedly occurred. Also, there is no suggestion that the Appellant informed the Delegate of or raised this issue during the hearing. Nor did the Appellant raise this issue in his original appeal material. The Appellant has failed to establish that he was in fact unable to hear or question testimony and thereby prevented from presenting and questioning the evidence of the opposing party.

The Appellant's objection to the Delegate's failure to provide him with copies of three pages of the Respondent's complaint form is also an issue properly dealt with under the rubric of natural justice.

Section 77 of the *Act* provides as follows:

> "If an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond."

In the *Employment Standards in British Columbia Annotated Legislation and Commentary* the authors say at page 10-23 as follows:

> "Section 77 does not require the Delegate to provide the Employer with a copy of statements made by third parties who are not party to the process and have no direct interest in the outcome, as long as the Delegate has advised the Employer of the content of any statement and given the Employer adequate opportunity to respond.
>
> *Re 317184 BC Ltd., (c.o.b Elkin Creek Guest Ranch),* [2003] BCESTD #87 (QL), (11 March 2003), BCEST #D087/03 (Stevenson, Adj.)."

Further, the authors say at the same page:

> "While Section 77 does not necessarily require production of the whole investigative file prior to issuing the Determination and is not intended to allow for a form of "discovery", there still must be meaningful disclosure of the details of the complaints in order to make the opportunity to respond reasonable and effective.
>
> *Re Cyber BC.com AD and Host Services Inc. (c.o.b. 108 Tempo and La Pizzeria),* [2002] BCESTD #344 (QL), (25 July 2002) BCEST #RD344/02 (Orr, Roberts, and Stevenson, Adj.)."

In this case I do not find that the Delegate's failure to provide the Appellant with three pages of the complaint form which was filed by the Respondent initiating the investigation has impaired the Appellant's ability to respond to and present its case. The complaint form itself was not evidence and it is apparent that the Appellant was fully informed of the nature of the complaint and evidence in support of it with a full opportunity to respond.

2. Use of new evidence.

The issue of the use of new evidence at appeal which was not presented to the Delegate at the investigation of the complaint has been considered several times by this tribunal. Indeed, in the case of *Specialty Motor Cars (1970) Ltd.,* BC EST #D570/98 there is reference to the "Tri-West/Kaiser Stables Rule". This issue was decided in *Tri-West Tractor Ltd.,* BC EST #D268/96 and *Kaiser Stables Ltd.,* BC EST #D058/97. In *Tri-West (supra),* the adjudicator there held evidence inadmissible because:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it…The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

Notwithstanding this exclusionary rule, the adjudicator in *Specialty Motors* (supra) held as follows:

> "However, it should also be recognized that the *Kaiser Stables* principal relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigation officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it

> was not initially disclosed and any prejudice to parties resulting from such nondisclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria."

In the present case it appears that this evidence of the Respondent's failure to adhere to restaurant recipes and procedures may not have been led at the investigation hearing as a result of a misunderstanding between the Delegate and the Appellant. Although the Delegate does not appear to have prevented the Appellant from leading this evidence, the fact remains that the Appellant did not do so. I find that this evidence was important and may have impacted on the result and, considering that it may not have initially been disclosed due to a misunderstanding between the Delegate and the Appellant I am going to consider this evidence on this appeal.

3. Did the Appellant have just cause to dismiss the Respondent such that the Respondent was not entitled to notice or compensation for length of service?

Section 63 of the *Act* provides for liability resulting from length of service. Section 63 provides as follows:

> *Section 63*
>
> *(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
>
> *(2) The employer's liability for compensation for length of service increases as follows:*
>
> *a) After 12 consecutive months of employment, to an amount equal to 2 weeks' wages;*
>
> *b) After 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus 1 additional week's wages for each additional year of employment, to a maximum of 8 week's wages.*
>
> *(3) The liability is deemed to be discharged if the employee*
>
> *a) is given written notice of termination as follows:*
>
> *i) one week's notice after 3 consecutive months of employment;*
>
> *ii) two weeks' notice after 12 consecutive months of employment;*
>
> *iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*
>
> *b) is given a combination of notice and money equivalent to the amount the Employer is liable to pay, or*
>
> *c) terminates the employment, retires from employment, or is dismissed for just cause.*

Thus, section 63 (3)(c) provides that an Employer may avoid liability for compensation or notice for length of service if the Employee is dismissed for just cause.

In the case of *Silverline Security Locksmith Ltd.*, BCEST #D207/96, this Tribunal delineated a four part test for determining whether just cause exists or not. In that case it was said as follows:

> Paragraph 11. The burden of proof for establishing that there is "just cause" to terminate Davis' employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.

> Paragraph 12. It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an Employer must be able to demonstrate "just cause" by proving that:
>
> 1) reasonable standards of performance have been set and communicated to the Employee;
>
> 2) the Employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
>
> 3) a reasonable period of time was given to the Employee to meet such standards; and
>
> 4) the Employee did not meet those standards.
>
> Paragraph 15. The concept of "just cause" requires the Employer to inform an Employee clearly and unequivocally that his or her performance is unacceptable and that failure to meet the Employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an Employee a false sense of security that their work performance is acceptable to the Employer.

While it is preferable (because it is easier to prove) that a warning be in writing, it is not required: Re: *Beaver Landscapes Ltd.*, BCEST #D035/98 (Peterson, Adjudicator). As stated in *Employment Standards in British Columbia Annotated Legislation and Commentary*, the Continuing Legal Education Society of British Columbia, 2000, at page 8-31 "The *Act* does not require that warnings be in writing. Nevertheless, from an evidentiary standpoint, if the warnings are in writing it is obviously easier for an employer to prove the circumstances of the warning and the consequences of repeating the conduct.": Re: *Paul Creek Slicing Ltd.*, BCEST #D132/99 (Peterson, Adjudicator).

In the present case, I find that the Appellant has failed to demonstrate an error in the Determination wherein the Delegate ruled that the single incident of April 4, 2003 did not amount to gross insubordination to the extent that it, in and of itself, it amounted to just cause.

With respect to the Respondent's failure to adhere to recipes and restaurant procedures I do not find that the Appellant has proven just cause in that the Appellant has failed to prove that it communicated reasonable standards of performance, warned the Employee clearly that her continued employment was in jeopardy if such standards were not met, that the Employee was given a reasonable period of time to meet such standards, and that the Employee did not meet those standards. There is no evidence that the Appellant clearly articulated to the Respondent what specifically she was required to change and that her employment was in jeopardy if those standards were not met.

4. Did the Director err in finding that the Employer business was carried on by or through an individual proprietor and corporation under common control or direction?

I find that the Appellant has failed to demonstrate an error in the Determination with respect to the individual proprietor and the corporation being associated entities.

Section 95 of the *Act* says as follows:

> ***95.*** *If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,*

> *(a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and*
>
> *(b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement, or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.*

In *Employment Standards in British Columbia Annotated Legislation and Commentary*, Alison G.C. and Pederson C.J., the Continuing Legal Education Society of British Columbia 2003 the authors say as follows:

> "There are four preconditions to an application of s. 95 to the circumstances of any matter before the Director: (1) there must be more than one corporation, individual, firm, syndicate, or association; (2) each of these entities must be carrying on a business, trade, or undertaking; (3) there must be common control or direction; and (4) there must be some statutory purpose for treating the entities as one employer.
>
> *Re Invicta Security Systems Corp.*, [1996] B.C.E.S.T.D. No. 340 (QL), (4 December 1996), BCEST #D249/96 (Stevenson, Adj.).
>
> *Re Braodway Entertainment Corp.,* (c.o.b. Wharfside Eatery), [1996] B.C.E.S.T.D. No. 180 (QL), (18 July 1996), BCES #D184/96 (Eden, Adj.).
>
> *Re Monchelsea Investments Ltd.,* [1997] B.C.E.S.T.D. No. 287 (QL), (15 July 1997), BCEST #D315/97 (Kempf, Adj.), reconsideration dismissed (23 October 1997), BCEST #D513/97 (Lawson, Adj.).
>
> *Re Adrenalin III Sports Ltd.*, [1997] B.C.E.S.T.D. No. 98 (QL), (7 March 1997), BCEST #D110/97 (Collingwood, Adj.)."

I find that the four preconditions to the application of Section 95 have been met in the present circumstances. This restaurant was previously operated by an individual which, shortly after the Respondent was dismissed, was carried on by a corporation the sole principal of whom was the same individual. It is apparent that the restaurant continues to be under the common control and direction of this one individual. The fact that the municipal, provincial and federal governments may recognize the corporation for business permits and taxes does not displace this finding.

5. Did the Delegate and the Tribunal err in failing to hold an oral hearing?

Section 107 of the *Act* says as follows:

> "Subject to any rules made under Section 109(1)(c), the Tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing."

In *Employment Standards in British Columbia Annotated Legislation and Commentary*, the authors say at page 12-9 as follows:

> "At a bare minimum, the parties must be given a fair opportunity to present evidence, question the evidence of the opposing party litigant, and tell the Tribunal what it should find. It is preferable that the hearing be structured to distinguish clearly between the evidence phase and the argument phase. However a less formal hearing than that set out in the appeal process pamphlet, published by the Tribunal will not necessarily constitute a breach of natural justice. The Tribunal has a

> discretion to conduct a hearing in the manner it deems appropriate to give the parties a fair opportunity to present and develop their case.
>
> *Re Rudowski*, [2000] B.C.E.S.T.D. No. 476 (QL), (9 November 2000), BCEST #D485/00 (Love, Adj.), reconsideration of BCEST #D316/00."

Further, at page 12-11 the authors say,

> "Generally, the Tribunal will not hold an oral hearing on an appeal unless the case involves a serious question of credibility on one or more key issues or it is clear on the face of the record that an oral hearing is the only way of ensuring that each party can state its case fairly.
>
> D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards), 2001 BCSC 575 (Ross J.).
>
> Re National Credit Counsellors of Canada Inc., [2003] B.C.E.S.T.D. No. 102 (QL), (25 March 2003), BCEST #D102/03 (Stevenson, Adj.)."

In the present case I cannot find that the Appellant was not given a fair opportunity to present evidence, question the evidence of the opposing party litigant and tell the Tribunal what it should find. I do not find that there were serious questions of credibility on one or more key issues or that, on the face of the record that an oral hearing was the only way of insuring that each party could state its case fairly.

6. Did the Delegate err in rendering a Determination following a failed "mediation"?

Section 78 of the *Act* provides as follows:

> *"The director may do one or more of the following:*
> *(a) assist in settling a complaint or a matter investigated under Section 76;"*

In the present case it is apparent that the attempt to mediate was ultimately unsuccessful. The Delegate did not err in rendering a Determination following the unsuccessful attempt to settle the matter.

Conclusion

I find that the Appellant has failed to demonstrate an error in the Delegate's Determination.

ORDER

Pursuant to section 115 of the Act, I order that the Determinations of this matter, dated August 27, 2003 and December 30, 2003 filed under number ER119-962, be confirmed.

W. Grant Sheard
Member
Employment Standards Tribunal