

An appeal

- by -

F & J Enterprises Corp. operating as The Oasis Hotel
(“F & J”)

- 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: David B. Stevenson

FILE No.: 2006A/24

DATE OF DECISION: April 24, 2006

9. The last day of operation for F & J was July 3, 2005. The last day that Deboer and Smith worked for F & J was July 3, 2005. Neither Deboer nor Smith worked for the purchaser of the hotel.
10. The Determination notes that F & J did not participate in the complaint investigation. The Determination also notes that a Demand For Payroll Records for Smith was successfully delivered by certified mail to the registered and records office of F & J and to each of the three directors shown in the corporate summary for F & J, but that no payroll records were received by the Director. The Record indicates that a notice of the complaint being made by Smith, which included a description of the two aspects of the claim being made, was included with the Demand.
11. Mr. Le Roux, who has filed this appeal on behalf of F & J, is listed as one of the directors and was one of the persons to whom the Demand and notice of the complaint for Smith was sent.

ARGUMENT AND ANALYSIS

12. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:
- 112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) the director erred in law;*
- (b) the director failed to observe the principles of natural justice in making the determination;*
- (c) evidence has become available that was not available at the time the determination was made.*
13. The burden of demonstrating an error in the Determination is on the appellant. In this case, F & J must show the Director failed to observe principles of natural justice in making the Determination.
14. The *Act* requires the complaint process to be procedurally fair. Procedural fairness is an aspect of natural justice. In the context of an investigation of a complaint, the scope of procedural fairness required to be provided to a person under investigation is set out in Section 77, which reads:
- 77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.*
15. A failure to make reasonable efforts to give a person under investigation an opportunity to respond is both a breach of the above statutory requirement and a failure to comply with principles of natural justice. Consonant with that statutory requirement is the requirement to notify the person under investigation of sufficient details of the complaint to make the opportunity to respond meaningful.
16. In the Determination, the Director say he is “satisfied that F & J was made aware that an investigation was taking place.” Reference is made to delivery of the Demand and the notice of the complaint to support that assertion. As indicated above, the Record supports a conclusion that F & J, through its registered and records office and through its three directors, was made aware of Smith’s complaint and given an opportunity to respond.
17. The Record contains no evidence indicating F & J was given notice of the complaint made by Deboer.

18. The Director also refers to telephone messages left with Mr. Le Roux and Brian Hall, another director of F & J. That position is repeated in the Director's reply to the appeal. There is no evidence in the Record, however, that telephone calls were made to Mr. Le Roux and Mr. Hall or that messages were left for either of them.
19. The Director also says the appeal is based on evidence not provided to the Director in the investigation. In reality, F & J has provided no evidence with the appeal, but made only bald assertions which, everything else being equal, would have no bearing at all on the merits of the appeal. The assertions made by Mr Le Roux, because they are unsupported by any evidence, have not been considered in deciding this appeal. I have considered only the Determination and the Record in reaching my conclusions on the appeal.
20. On that basis, while the Director says that F & J was aware of both complaints and of the accompanying investigation on those complaints, the Record does not allow me to reach that conclusion in respect of the complaint by Deboer. Rather, the Record indicates the Director failed to comply with the requirements of Section 77 of the *Act* in respect of the complaint from Deboer and, as a result, failed to comply with principles of natural justice in making the Determination.
21. Accordingly, the Determination is set aside and the matter is referred back to the Director. My findings only affect the Director's conclusions on the complaint made by Deboer and only require that F & J be given notice of that complaint and an opportunity to respond to that complaint.
22. This decision does not open the door to F & J on the complaint made by Smith. I have found, in respect of that complaint, that F & J was given an opportunity to respond and provided with sufficient details of the complaint to make the opportunity to respond meaningful. The failure of F & J to respond on Smith's complaint is not the result of any failing on the part of the Director. In other words, F & J has not shown the Director failed to comply with principles of natural justice in making the Determination on Smith's complaint. In the absence of any reviewable error, it would be inappropriate, and inconsistent with the purposes and objects of the *Act*, to allow F & J what would amount to a "second kick at the can" on that complaint.
23. The appeal is allowed in part.

ORDER

24. Pursuant to Section 115 of the *Act*, I order the Determination dated January 13, 2006 is confirmed with respect to Smith and is referred back to the Director with respect to Deboer.

David B. Stevenson
Member
Employment Standards Tribunal