

An appeal

- by -

607730 B.C. Ltd. operating as English Inn & Resort
("English Inn & Resort")

- 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 Ann Hart

FILE No.: 2005A/13

DATE OF DECISION: April 15, 2005

DECISION

SUBMISSIONS

Justine Heinz on behalf of English Inn and Resort

Luke Krayenhoff on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by 607730 B.C. Ltd. operating as English Inn & Resort (“English Inn and Resort”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued on 22 December, 2004 by a delegate of the Director of Employment Standards (the “Director”).

In the Determination, the delegate of the Director considered a complaint filed under section 74 of the *Act* by Richard Magee, who alleged that English Inn and Resort had contravened the *Act* by failing to pay wages upon termination, statutory holiday pay, and fees for cashing his paycheques.

The delegate of the Director held a hearing on 7 December 2004. In the Determination dated 22 December 2004 (the “Determination”), the delegate for the Director found that section 18 of the *Act* had been contravened, and Mr. Magee was entitled to \$1736.36 in wages paid on termination, plus \$20.30 in interest pursuant to section 88 of the *Act*. In addition, an administrative penalty of \$500.00 was imposed on English Inn and Resort pursuant to section 29 of the *Act* as a result of its contravention of the *Act*.

The appeal is brought by English Inn and Resort which seeks to have the Determination changed or varied on the grounds that the Director failed to observe the principles of natural justice in making the Determination.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

Was there a failure to observe the principles of natural justice in making the Determination?

THE FACTS

According to the Determination, Richard Magee worked as a draughtsman for English Inn and Resort on contract, and then as an employee from April 2004 until 3 September 2004. From 3 September 2004, Mr. Magee worked one day per week until 17 September 2004, when he was laid off without written notice or pay in lieu of notice.

The delegate of the Director reviewed the records provided by the parties of the hours worked by Mr. Magee, and preferred the records of the English Inn and Resort which revealed that the amount of \$504.93 in regular wages was owing. The delegate further found, based on the records of the employer, that \$272.25 in overtime pay, and \$364.97 in vacation pay was owing. It was the decision of the

delegate of the Director that the fee paid by Mr. Magee to cash his paycheque at Money Mart was not a charge for which the employer was responsible, and no statutory holiday pay was owed by the employer. Finally, the delegate of the Director determined that because Mr. Magee was given neither written termination notice nor payment in lieu of notice, he was entitled to compensation for length of service in the amount of \$560.88.

ARGUMENT

English Inn and Resort submitted that the employee had verbally agreed to a flexible work schedule, and this had been ignored by the delegate of the Director in his findings. On the Appeal Form in response to the question asking what remedy was sought from the Tribunal, the agent for English Inn and Resort wrote that “a reduction in the money owed” was requested. In the final submission for English Inn and Resort dated 7 March 2005, Justine Heinz, Administrative Assistant wrote in part as follows:

“It was agreed that Mr. Magee would work a flexible work schedule, he was never subjected to a mandated schedule. Please note that he never requested overtime. He took it upon himself to work the hours that he chose.”

The Director’s delegate submitted that even if there had been a verbal agreement by the complainant to work overtime without additional compensation, such an arrangement would be a breach of section 4 of the *Act* which prohibits contracting out of the minimum requirements of the *Act*. Section 40 of the *Act* provides the method by which overtime must be compensated. Overtime pay is required unless: the employer entered into a written averaging agreement with the employee; or the employer obtained a variance. In the circumstances of this case, there was no written averaging agreement, and no variance had been obtained.

ANALYSIS

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

- (a) the delegate for the Director erred in law
- (b) the delegate for 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.

The Tribunal may not set aside findings of fact made by the delegate for the Director unless, in reaching conclusions, the delegate for the Director erred in law or failed to observe the principles of natural justice; or new evidence has become available that was not available at the time it was made.

The burden rests with the party alleging an error of natural justice, to demonstrate that error. An appeal to the Tribunal is not a re-investigation of the complaint or an opportunity to re-argue positions taken during the investigation.

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. The Tribunal has held that the Director and his delegates are acting in a

quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be granted to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D 050/96).

English Inn and Resort's appeal is solely based on its disagreement with the findings made by the delegate for the Director. English Inn and Resort submitted that the employee had verbally agreed to a flexible work schedule, and this had been ignored by the delegate of the Director in his findings.

It has been accepted by the Tribunal, that in some cases, errors on findings of fact can amount to errors of law. However, the appellant would be required to demonstrate that (a) the findings of fact made by the Director were not supported by evidence; or (b) that the Director viewed the facts in a way that could not reasonably be entertained given the evidence that was before the Director (see *Gemex Developments Corp. and Assessor of Area #12 Coquitlam*, [1988] B.C.J. No. 2275 (BCCA)).

Section 40 of the *Act* requires that an employer pay compensation for overtime where an employee works in excess of 8 hours per day, and is not working under an averaging agreement. Section 37(2)(a)(i) of the *Act* provides that an averaging agreement is not valid unless it is in writing. In the Determination, the delegate wrote that the employer had agreed that there was no averaging agreement in place. A variance for section 40 of the *Act* may be obtained pursuant to section 72 of the *Act*. However, section 72 provides that an application for a variance must be made in writing to the Director. No variance was obtained in this case. In the absence of a written averaging agreement or a variance, English Inn and Resort was required to pay overtime pay.

The documentation on record and the Determination demonstrate that there was evidence to support the findings of fact made by the delegate for the Director, and I cannot conclude that the view of the facts taken by the delegate for the Director was one that could not reasonably be entertained given the evidence he had before him in making the Determination. The delegate correctly applied the legislation, including section 40 of the *Act*.

There is no evidence to support a finding that the delegate for the Director failed to observe the principles of natural justice in making the Determination. For all of the above reasons, I dismiss the appeal and confirm the Determination together with interest in accordance with section 88 of the *Act*.

ORDER

I ORDER pursuant to Section 115 of the Act, that the Determination dated 22 December 2004 is confirmed together with interest in accordance with section 88 of the Act.

Carol Ann Hart
Member
Employment Standards Tribunal