

An appeal

- by -

Chilliwack Food & Beverage Ltd.  
("CF&B")

- 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.:** 2008A/37

**DATE OF DECISION:** June 6, 2008



9. The Determination states that the issues as being whether McCaw was an employee of CF&B through the entire period from November 1, 2005 to November 14, 2006 and, if so, whether there was wages owing. The issue of the identity of the employer over the period appears to have arisen, in part at least, as a result of a Revenue Canada ruling that during the period McCaw was an employee of CF&B from November 1, 2005 until April 30, 2006 and an employee of Brian Mosychuk, one of the principals of CF&B, from May 1, 2006 to August 31, 2006.
10. The Director found that for the purposes of the *Act*, McCaw was an employee of CF&B for the entire period. The Director also found that no regular wages were owing, but found McCaw had not received annual vacation pay in accordance with the *Act* and was owed annual vacation pay in the amount of \$644.62. In calculating the amount of annual vacation pay owed, the Director found McCaw had received annual vacation time off and annual vacation pay in the period December 24, 2005 and January 1, 2006.

## ARGUMENT

11. The argument of CF&B is that the Director ought to have considered whether McCaw had any annual vacation time off with pay other than the period from December 24, 2005 to January 1, 2006. CF&B points to the period from May 1, 2006 to August 31, 2006, where McCaw was paid \$4000.00 but “only worked 17 out of 122 calendar days” and the month of November 2006 where CF&B says that McCaw was paid his full salary for the month even though he was terminated on November 12, 2006 and just prior to his termination McCaw took “several days off” for “personal reasons”. That last assertion does not appear to be borne out by the record, but in any event is not relevant to my decision.
12. CF&B argues that somewhere in all of that should rest the conclusion that McCaw was “amply” paid for annual vacation.
13. CF&B also says that McCaw had to be reprimanded at various times by the Director’s delegates for threatening their representative, or representatives, and using “strong arm and bullying tactics” during the process.
14. In response, the Director says the appeal does not raise an issue of natural justice at all, but rather challenges a finding of fact. The Director says CF&B had notice of the case against and had the opportunity, which it exercised, to respond fully to that case before an independent decision maker.

## ANALYSIS

15. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those 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.*

16. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. An appellant alleging a failure to observe principles of natural justice, as CF&B does in this appeal, must provide some objectively cogent evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99). As the Tribunal said in *Imperial Limousine Service Ltd.*, BC EST #D014/05:

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. It has been previously held by the Tribunal that the Director and her 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 accorded 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 #D050/96).

17. There is no evidence that CF&B was not provided an opportunity to know the position being taken by McCaw or not given an opportunity to respond. CF&B says McCaw's "abusive" conduct is the primary source for the natural justice argument. CF&B says: "the Delegate did not provide us with an atmosphere conducive to natural justice". While that view may be entirely reasonable from CF&B's perspective, it is in the final analysis a subjective view unaccompanied by any objective basis for concluding the alleged conduct by McCaw interfered with the opportunity or ability to know the case and provide a full response to it. I find that CF&B has failed to meet the onus of demonstrating the Director failed to observe principles of natural justice in making the Determination.
18. At its core, however, this appeal is not really about principles of natural justice, but is about a disagreement by CF&B with the conclusion of the Director that McCaw was owed wages for annual vacation pay. In that respect, I make the following point.
19. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). The Tribunal has adopted a definition of "error of law" that is set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.). There is no error of law in this case.
20. It is apparent from the Determination and an examination of the Section 112 record that the Director was aware of the days McCaw had worked in the period May 1, 2006 to August 31, 2006 and November 2006. I accept the comment of the Director that there is no evidence that any of the non-working days in these periods were intended or could properly be considered as annual vacation time off with pay. The factual finding that McCaw was on vacation time off in the December 24, 2005 to January 1, 2006 period necessarily infers a finding or conclusion of fact that he was not on vacation time off in any other period of his employment. The finding relating to which periods during McCaw's employment were, and by logical implication were not, vacation time off is a finding or conclusion which I have no authority in the circumstances of this case to disturb.
21. The appeal is dismissed.

**ORDER**

22. Pursuant to Section 115 of the Act, I order the determination dated March 7, 2008 be confirmed in the amount of \$1195.67, together with any interest that has accrued under Section 88.

---

**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**