

An appeal

- by -

0724193 B.C. Ltd. operating as The Oasis Hotel

- 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: John Savage

FILE No.: 2006A/37

DATE OF DECISION: May 30, 2006

DECISION

SUBMISSIONS

Frankie Chu, Dorothy Wheeler, Michael Fong, for 0724193 B.C. Ltd. operating as the Oasis Hotel
Greg Brown, for the Director of Employment Standards

OVERVIEW

1. 0724193 B.C. Ltd (the “Employer”), operating as the Oasis Hotel, appeals a Determination of the Director dated February 3, 2006, that found wages owing Annie Berg (“Berg”) and Monique Kondra (“Kondra”), and imposed administrative penalties for breaches of the *Employment Standards Act*, R.S.B.C.1996, c.113 (the “Act”).
2. Berg was employed in the Cold Beer and Wine Store and Kondra was employed as a Bartender/Hostess in the lounge, both at the Oasis Hotel. Berg commenced employment at the Oasis Hotel in September 1994 and she worked continuously until August 11, 2005. Kondra’s employment commenced March 25, 2003 and she worked continuously until August 29, 2005.
3. On July 3, 2005 the Oasis Hotel was purchased by the Employer from F & J Enterprises Corp.
4. Berg received a Record of Employment (“ROE”) from F & J Enterprises Corp. dated July 8, 2005 specifying that her employment terminated on July 3, 2005. The ROE gave the reasons for leaving as “K - other” and in the comments section noted that the hotel had sold. Berg then received a second ROE from the Employer dated August 17, 2005. The second ROE from the new owner gave the reasons for leaving as “E - quit”. It noted that her work commenced July 4, 2005.
5. Kondra received an ROE from F & J Enterprises dated July 8, 2005 also specifying that her employment terminated on July 3, 2005. The reason was similar to that received by Berg. She never received an ROE from the Employer. Kondra worked for the Employer from July 4, 2005 to August 29, 2005.
6. After receiving complaints from Berg and Kondra the Director commenced an investigation. The Employer did not actively participate in the investigation. It did not respond to demands for payroll records, did not return phone calls, and, although contacted, did not provide its position in the dispute. The Director found that there were wages owed and imposed administrative penalties.
7. The Employer now appeals the Determination of the Director on the basis that the Director erred in law, failed to observe the principles of natural justice, and that evidence has become available that was not available at the time the Determination was made.
8. On reviewing the submissions of the appellant, it is clear that the main focus of the appeal is that the Director did not receive any submission from the Employer. Letters and other information were filed with the appeal that the Delegate of the Director did not see. This material could only be received if there was a breach of natural justice in the procedure employed in the investigation, or if it qualifies as evidence that was not available at the time the Determination was being made.

9. The Tribunal determined to hear the appeal by way of written submissions and received written submissions from the Employer and the Director, including a late submission from the Employer.

ISSUES

10. The stated issues in this appeal are whether the Director of Employment Standards erred in law, whether there was a breach of natural justice in the circumstances of the investigation, and whether evidence has become available that was not available at the time the Determination was being made.

LEGISLATION

11. Section 112(1) of the *Act* sets out the grounds of appeal:

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 being made.

12. Where an investigation is conducted, the Director must comply with section 77 of the *Act*:

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond. 1995, c. 38, s. 77.

13. An employer is required to keep and maintain payroll records:

28. (1) For each employee, an employer must keep records of the following information:
- (a) the employee's name, date of birth, occupation, telephone number and residential address;
 - (b) the date employment began;
 - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
 - (e) the benefits paid to the employee by the employer;
 - (f) the employee's gross and net wages for each pay period;
 - (g) each deduction made from the employee's wages and the reason for it;
 - (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
 - (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
 - (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.

14. A person served with a demand for payroll records is required to respond:

85. (1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:
- ...

- (c) inspect any records that may be relevant to an investigation under this Part;
 - ...
 - (f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).
15. It is a breach of the *Act* to fail to pay wages (section 17), to not pay annual vacation (section 58), to not pay compensation for length of service (section 63), and to fail to provide payroll records (section 46).
16. A breach of the *Act* gives rise to the administrative penalties set out in section 29 of the *Employment Standards Regulation*, B.C. Reg. 396/95:
- 29. (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act, must pay the following administrative penalty:
 - (a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3 year period preceding the contravention, a fine of \$500;
 - (b) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under that paragraph occurred, a fine of \$2 500;
 - (c) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under paragraph (b) occurred, a fine of \$10 000.

DISCUSSION AND ANALYSIS

A. *Error of Law*

17. There is nothing in the submission of the Employer that describes any error of law in the legal reasoning set forth in the Determination of the Delegate. The error of law, if there is one, must be related to the investigation by the Delegate or be consequential on the receipt of new evidence.

B. *Principles of Natural Justice*

18. An investigation under the *Act*, does not necessarily give rise to the full panoply of natural justice rights arising in a purely judicial context. The attributes of natural justice may vary according to the character of the decision and the context in which it applies: *Martineau v. Matsqui Disciplinary Board* [1980], 1 S.C.R. 602.
19. The appropriate procedures will in each case depend on the provisions of the statute and the context in which they are applied: *Downing v. Graydon*, (1978) 29 O.R. (2d) 292. It has been held, for example, that the Director during an investigation should not be placed in a procedural strait-jacket: *Isulpro Industries Inc.*, BC EST #D405/98.
20. Section 77 of the *Act* relates specifically to investigations under the *Act*. Section 77 does not mandate a face-to-face hearing or meeting between the Delegate and person under investigation, but it does require that reasonable efforts be made so that the person under investigation is made aware of the allegations and be given a reasonable opportunity to respond: *Re Medallion Developments Inc.*, [2000], BC EST #D235/00.

21. In the present case the Director's Delegate sent letters dated September 6, 2005 by certified mail to the Employer at its registered and records office and to the two Directors, Keung Kin Chu and Judy Yuet Tuen Yeung. The first letter advised of the general nature of the complaints and requested copies of payroll records and other supporting documentation. The second letter demanded payroll records for all employees for the period March 1, 2005 to August 31, 2005. Accompanying the letters were extracts from the *Act*.
22. Included with the records of the investigation are receipts from Canada Post showing that the letters were received, a BC Online Summary showing the registered and records office of the Employer and the addresses of the two listed directors which matches the receipts signed by them acknowledging delivery of the mail.
23. The Delegate in his submission also noted that that the Manager of the Oasis Hotel, Michael Fong ("Fong"), was contacted on October 5, 2005. Fong asked that the company lawyer, Russell Lew ("Lew"), be contacted. A copy of the Demand for Payroll Records was also faxed to Lew on October 5, 2005. In conversation Lew advised the Delegate that he would get back with a date and time to meet representatives of the Employer. Lew was contacted again on November 22, 2005 and December 20, 2005 but no phone calls were returned setting a date and time for a meeting. On November 22, 2005, two letters were sent to Lew, one setting out the general nature of the complaints, and a second being a Demand for Employer Records enclosing copies of excerpts from the *Act*.
24. When nothing further was heard from the Employer, the Delegate issued his Determination on February 3, 2006.
25. In summary, in this case the manager, Fong, was contacted, the registered and records office received notification of the investigation and a Demand for records, and the two listed directors of the company also received this material. The corporate lawyer, to whom inquiries were directed, was also contacted and received the Demand. The Officer made these efforts over a four month period all to no avail.
26. An appeal under the *Act* is not an opportunity to present one's case for the first time. This Tribunal has held, for example, that an appeal is not an opportunity to make a case that should have been made to the Delegate during the investigation process: *Re Tri-West Tractor Ltd.*, BC EST #D268/96, *Re Kaiser Stables Ltd.*, BC EST #D058/97.
27. In my opinion it was incumbent on the Employer to respond in a timely way to the inquiries. It failed to do so. In these circumstances, in my opinion, there is nothing to suggest that the investigation of the Officer gave rise to a breach of natural justice or that section 77 of the *Act* was not complied with. There was no breach of natural justice in the conduct of the investigation leading to the Determination of the Delegate.

C. New Evidence

28. Section 112(1)(c) of the *Act* provides a right of appeal where a party has "evidence has become available that was not available at the time the determination was being made". In deciding whether the Tribunal should receive new evidence on appeal the Tribunal noted in *Re Merilus Technologies Inc.*, [2003] BC EST #D171/03 that it has been guided by the test applied in civil courts for admitting fresh evidence on appeal.

29. The test for admitting fresh evidence on appeal involves the consideration of the following factors: (1) whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing, (2) the evidence must be relevant to a material issue in the appeal, (3) the evidence must be credible in the sense that it is reasonably capable of belief, and (4) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on a material issue.
30. In this case the new evidence sought to be introduced is correspondence between the employer and the employees exchanged during the course of employment, in July and August, 2005. There is also a pub schedule and an explanation given by the corporate accountant, Dorothy Wheeler. All of this information addresses matters that should have been presented to the Delegate during his investigation. It was evidence that was readily available to the Employer at all material times. The Employer chose not to respond. This was after the investigation was brought to the attention of the Manager, Fong, the corporate solicitor, Lew, and the Directors, Chu and Yeung.
31. In my opinion, the evidence sought to be introduced during this appeal is all evidence that was clearly available and with due diligence could have been presented to the Delegate. It does not therefore qualify as evidence that “was not available at the time the determination was being made”. This ground of appeal fails.

SUMMARY

32. There is no error of law shown by the reasons. There was no breach of natural justice in the conduct of the investigation giving rise to the Determination. The new evidence sought to be introduced does not qualify to be introduced as it was available at the time of the investigation, before the Determination was made.

ORDER

33. The appeal is dismissed and pursuant to Section 115 of the *Act*, the Determination of the Delegate is confirmed.

John Savage
Member
Employment Standards Tribunal