Employment Standards TRIBUNAL

An appeal

- by -

Fiction Restaurant Ltd.
("Fiction")

- 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 L. Roberts

FILE No.: 2005A/44

DATE OF DECISION: May 13, 2005

DECISION

SUBMISSIONS

Sean Sherwood	on behalf of Fiction Restaurant Ltd.
Rod Bianchini	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Fiction Restaurant Ltd. Ltd. ("Fiction"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued February 18, 2005.

Jeff Wernbacher worked for Fiction as a head chef from April 10, 2003 until November 1, 2003. Mr. Wernbacher filed a complaint alleging that he was owed regular wages, vacation pay and compensation for deductions from wages.

The Director's delegate held hearing into Mr. Wernbacher's complaint on October 14, 2004. Mr. Wernbacher appeared on his own behalf, no one appeared for Fiction.

Following the hearing, the delegate determined that Fiction contravened Sections 18, 58, 21 and 25 of the *Employment Standards Act* in failing to pay Mr. Wernbacher one week regular wages, compensation for unauthorized deductions and laundry costs, and vacation pay. The delegate determined that Mr. Wernbacher was entitled to wages, including interest, in the amount of $2,863.63. The delegate also imposed a $2,000 penalty on Fiction for each of the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations.*

Fiction argues that new evidence has become available that was not available at the time the Determination was made. Mr. Sherwood contends that he was unable to be present at the hearing despite numerous attempts to contact the delegate, and that none of Fiction's evidence was considered.

Although Fiction sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUE

Has new evidence become available that was not available at the time the Determination was being made as a result of Fiction's failure to attend the hearing?

THE FACTS AND ARGUMENT

Mr. Wernbacher submitted his complaint form to Fiction and to the delegate on November 23, 2003. Mr. Wernbacher and Fiction were contacted to discuss a mediated settlement. In an April 27, 2004 letter to Fiction, a branch officer outlined Mr. Wernbacher's allegations and issued a Demand for Employer

Records. The letter also confirms a discussion a delegate had with Mr. Sherwood about Mr. Wernbacher's allegations and Mr. Sherwood's indication that he would reply to the complaint.

Fiction did not produce those records by the Demand letter's May 17, 2004 deadline. A second demand letter was sent June 10, 2004, along with an outline of the Branch's attempts to contact Fiction. The deadline for the production of records was extended to June 20, 2004. No documents were produced, and on June 20, 2004, the delegate issued a Determination imposing a $500 penalty for Fiction's failure to produce employer records contrary to section 46 of the *Act*. Fiction received the Determination and successfully appealed it. (*BCEST #D024/05*)

Although all of the mail was sent to the same address, some of the registered mail was returned. The June 20, 2004 Determination and the August 17, 2004 letter setting the date for the hearing of Mr. Wernbacher's complaint were sent to the Mr. Sherwood's address as well as Fiction's registered and records office. The August 17, 2004 letter set out the date and time of the hearing (10:00 a.m. October 14, 2004), copies of information sheets about the hearing as well as a request to have all documents that would be relied on at the hearing submitted prior to the hearing. Canada Post tracking information indicated that the August 17, 2004 letter was successfully delivered to Fiction's registered and records office.

Fiction did not appear at the time and date set for the hearing. The delegate left a voice mail message for Mr. Sherwood requesting that he contact the Branch, and indicating that the hearing would proceed at 10:30 a.m.

The delegate was satisfied that Fiction had knowledge of the opportunity to appear at the hearing and proceeded with the hearing in Fiction's absence. The delegate found Mr. Wernbacher to be credible, and found his evidence to be consistent and probable. The decision is noted above.

Mr. Sherwood states that Fiction has been unable to present the information necessary for the delegate to decide the case. He also alleges that his repeated phone calls went unanswered, although he does not set out any of the dates he called, say what information he would have conveyed had they been answered, or why he would not fax or mail in letters conveying that information if he was unable to speak to a delegate.

Mr. Sherwood contends that Mr. Wernbacher was paid for his last week of work, that all employee's uniforms were laundered by a company on contract to Fiction for that purpose, and that there was no agreement that Mr. Wernbacher be paid for time spent in European restaurants.

Mr. Sherwood contends that he attempted to contact the delegate to change the hearing date due to extenuating circumstances without success, and was unable to attend the hearing due to those circumstances.

The delegate submits that Mr. Sherwood did not request an adjournment or send a representative to present evidence or request an adjournment. He further submits that Mr. Sherwood presents no evidence of dates he was required to be away, or why he could not have made his adjournment request in writing.

Finally, the delegate submits that Fiction's appeal reasons are essentially identical to the February 16, 2004 letter referred to in the Determination, and which was the only information Fiction submitted in

response to Mr. Wernbacher's allegations. The delegate submits that this information was in fact considered in arriving at the Determination.

In reply, Mr. Sherwood repeats his position that he did not attend the hearing due to extenuating circumstances, and that he attempted to telephone the delegate many times without success to deal with this issue. He contends that justice, not administration or bureaucracy, need to be served.

ANALYSIS AND DECISION

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

(a) the director erred in law

(b) 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

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

2. the evidence must be relevant to a material issue arising from the complaint;

3. the evidence must be credible in the sense that it is reasonably capable of belief; and

4. the evidence must have high potential 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 the material issue.

Although I appreciate, and sympathize with Mr. Sherwood's personal circumstances, the fact is that he made only one successful attempt to respond to Mr. Wernbacher's allegations. The delegate made many attempts over a period of approximately six months to obtain employer records for Mr. Wernbacher. Mr. Sherwood's response during that period of time was simply to challenge the accuracy of the allegations against him. He submitted one letter to the delegate, by fax, on February 16, 2004. He ignored all other attempts to contact him, and failed to appear at the hearing. I note that in his submissions in the appeal of the penalty Determination, Mr. Sherwood acknowledged that he did not often pick up registered mail because it "usually meant bad news".

Mr. Sherwood provided no good reason why Fiction could not have appeared at the hearing through a representative other than himself, and provided no evidence other than his own assertions as to those extenuating circumstances such as hotel receipts, gas bills or medical evidence.

I find that Fiction knew about the hearing, and failed to appear. The delegate was entitled to conduct the hearing in Fiction's absence. Fiction could have provided written submissions in advance of the hearing, as it was required to do. It did not. Fiction could have asked for an adjournment, by fax, in writing, or through a representative. It did not. It is also possible Fiction could have avoided the hearing entirely by submitting documents in support of the position it now advances. It did not.

I find no grounds for the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated February 18, 2005 be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal