Employment Standards TRIBUNAL

An appeal

- by -

Shuster Enterprises Ltd. dba PJ's 2 for 1 Pizza
("Shuster Enterprises")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2004A/30

DATE OF DECISION: May 12, 2004

DECISION

SUBMISSIONS

Phyllis Thorkelson	for Shuster Enterprises Ltd.
Cynthia R. Nelson	on her own behalf and on behalf of Vance V.T. Ridsdale
J. Ross Gould	for the Director of Employment Standards

INTRODUCTION

This is an appeal filed by Shuster Enterprises Ltd. ("Shuster Enterprises") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Shuster Enterprises appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on January 23rd, 2004 (the "Determination"). The Determination was issued following an oral hearing conducted by the delegate on December 19th, 2003.

THE HEARING BEFORE THE DIRECTOR'S DELEGATE

Shuster Enterprises' principal, Ms. Phyllis Thorkelson, appeared in person before the delegate at the hearing. Ms. Thorkelson's two daughters, Ms. Tara Burkett and Ms. Lorna Burkett, also testified on behalf of Shuster Enterprises (Tara Burkett in person; Lorna Burkett by teleconference) at the hearing. Ms. Cynthia R. Nelson ("Nelson") and Mr. Vance V.T. Ridsdale ("Ridsdale"), the complainants and former Shuster Enterprises employees, both testified on their own behalf by teleconference.

After hearing the various witnesses, the delegate determined that Shuster Enterprises failed to prove it had just cause to terminate either Ms. Nelson or Mr. Ridsdale. Accordingly, Ms. Nelson and Mr. Ridsdale were each awarded one week's wages (together with concomitant vacation pay) as compensation for length of service. In addition, the delegate levied a $500 administrative penalty against Shuster Enterprises pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.* The total amount of the Determination is as follows:

Payable to Ms. Nelson (including vacation pay and s. 88 interest)	= $422.25
Payable to Mr. Ridsdale (including vacation pay and s. 88 interest)	= $337.80
Administrative Penalty	= $500.00
TOTAL	= $1,260.05

I note that the Determination appears to contain an error. As set out in the "Reasons for the Determination", the delegate awarded Ms. Nelson and Mr. Ridsdale a total of $720.00 on account of compensation for length of service and $28.80 on account of vacation pay. However, the Determination itself indicates that $732.00 and $29.28, respectively, were awarded on account of these latter two claims. So far as I can determine, the amounts set out in the Reasons reflect the correct amounts.

By way of a letter dated April 22nd, 2004 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be

held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). None of the parties requested that an oral appeal hearing be held in this case.

Shuster Enterprises did not file any submission other than its notice of appeal. Ms. Nelson filed a brief handwritten submission on behalf of herself and Mr. Ridsdale (whom I understand to be her "common law" spouse). The Director's delegate also filed a brief submission and, in addition, provided the "record" of the proceedings pursuant to section 112(5) of the *Act.*

ISSUES ON APPEAL

Shuster Enterprises appeals the Determination on the ground that evidence has become available that was not available at the time the Determination was being made [see section 112(1)(c) of the *Act*]. More particularly, Shuster Enterprises has tendered a report, prepared by the accounting firm Deloitte & Touche LLP and dated February 26th, 2004, which, according to Shuster Enterprises, shows that the Ms. Nelson and Mr. Ridsdale were "dismissed with cause because of theft".

On its appeal form Shuster Enterprises states: "The two employees were dismissed with cause because of theft. Attached is a report". The appeal form, and attached report, constitute the only material Shuster Enterprises submitted to the Tribunal.

ANALYSIS

Shuster Enterprises operates a pizza restaurant under the firm name "PJ's 2 for 1 Pizza". At the time of their dismissals (September 23rd, 2003), Ms. Nelson was managing the restaurant (situated in Terrace) and Mr. Ridsdale was employed as a cook. Given their respective tenures, each was entitled to one week's wages as compensation for length of service (or, alternatively, one week's written notice of termination) if either was terminated without just cause. Of course, if an employee is dismissed for just cause, the employer is not obliged to pay any compensation for length or service or to give written notice in lieu of compensation [see section 63(3)(c) of the *Act*].

Shuster Enterprises' position before the delegate was, in essence, that it had just cause for dismissing both Ms. Nelson and Mr. Ridsdale based on performance issues (for example, not attending to cleaning duties; producing poor quality food) as well as for dishonesty--principally, falsifying time records (what the delegate termed "pay fraud"), taking inventory without paying for it, and theft of cash receipts.

The delegate concluded that while some of the complainants' performance deficiencies were not "trivial" and "could have eventually led to termination if the Complainants failed to respond to the Employer's unequivocal directions to change their behaviour", these matters did not give the employer just cause because, among other things, the employer had failed to issue warnings, had not resorted to progressive (or indeed any) discipline and had not unequivocally established job-related performance standards. I entirely agree with the delegate's analysis of these latter matters.

As for the matter of dishonesty, the delegate concluded that Shuster Enterprises' evidence on that issue fell well short of affirmative proof. This appeal, so far as I can determine, is predicated on Shuster Enterprises' assertion that it can now affirmatively prove theft by Ms. Nelson and Mr. Ridsdale. To that latter end, Shuster Enterprises filed a report, dated February 26th, 2004, prepared by the accounting firm Deloitte & Touche LLP. As noted above, this report constitutes the so-called "new evidence".

In my view, this latter report does not amount to "evidence that has become available that was not available at the time the Determination was being made". Clearly, the report post-dates the hearing before the delegate. That point, however, begs the fundamental fact that this report could easily have been prepared and presented to the delegate had Shuster Enterprises commissioned it at an earlier point in time. The report compares Shuster Enterprises' financial and other internal information for the periods from July 1st, 2002 to September 30th, 2002 and from July 1st, 2003 to September 30th, 2003. All of this latter financial information was available to be examined (and indeed was, in a fashion, presented to the delegate) and summarized in a report well prior to the delegate's hearing conducted on December 19th, 2003. Clearly, the accountant's report is not new evidence.

In *Davies et al. (Merilus Technologies Inc.*), B.C.E.S.T. Decision No. D171/03, the Tribunal stated (at p. 3) the following with respect to this particular ground of appeal:

> This ground [i.e., the "new evidence" ground] is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> (a) 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;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) 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.

In my view, the accountant's report fails on all of the above criteria with the possible exception of (b). I might note, as well, that while the author of the report makes some rather veiled accusations against Ms. Nelson and Mr. Ridsdale--"it is our understanding that Ms. Nelson and Mr. Ridsdale's actions may have been fraudulent in nature" (at p. 6)--without, I might add, very much in the way corroborating proof, I also note that at the outset of the report the author specifically states:

> This preliminary report is not an opinion as to whether any alleged fraud occurred, nor has an opinion been requested. No opinion shall be expressed regarding the quilt [sic, guilt] or innocence of any person or party.

In sum, the accountant's report does not constitute "new evidence" nor does it have much, if any, probative value in terms of proving theft by one or both of Ms. Nelson or Mr. Ridsdale.

Ordinarily, I would simply dismiss this appeal and confirm the Determination. However, in light of the apparent error in setting out the proper amounts payable under the Determination, I propose to issue a

variance order. In the event that I have erred in this regard, and the delegate has a reasonable explanation for the differing amounts payable as between the Reasons and the Determination, I shall reserve jurisdiction for 30 days after the issuance of these reasons to allow the delegate to file a submission on this latter matter.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be varied to reflect the following amounts payable by Shuster Enterprises:

Payable to Ms. Nelson (including vacation pay and s. 88 interest)	= $422.25
Payable to Mr. Ridsdale (including vacation pay and s. 88 interest)	= $337.80
Administrative Penalty	= $500.00
TOTAL	= $1,260.05

In addition, Ms. Nelson and Mr. Ridsdale are both entitled to whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance of the Determination.

In all other respects, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal