Employment Standards TRIBUNAL

An appeal

- by -

Aldergrove Fitness Fanatx Ltd.
("Fitness" or "Employer")

- 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

ADJUDICATOR: Paul E. Love

FILE No.: 2003A/9

DATE OF DECISION: March 11, 2003

DECISION

OVERVIEW

This is an appeal by an employer, Aldergrove Fitness Fanatx Ltd. ("Fitness" or "Employer"), from a Determination dated December 27, 2003 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Delegate conducted an evidentiary hearing, and found that the employee, Carly Ashdown was entitled to be paid by the Employer the sum of $1,022.86, which included claims for vacation pay, statutory holiday pay, regular wages, compensation for length of service, uniform costs and interest. The Delegate appears to have preferred the evidence provided by the Employee at the hearing, and the principals of the Employer did not attend, but the Employer sent two employees (now managers). The Employer filed a notice of appeal, but has not provided any meaningful submission in support of its assertion that the Determination ought to be cancelled or varied. I therefore dismissed the appeal, and confirmed the Determination.

ISSUE:

Did the Employer identify any error in the Determination, warranting a review by the Tribunal?

FACTS

I decided this case after considering the submissions of the Employer, and Employee and the record of the hearing provided by the Delegate. The Delegate conducted an evidentiary hearing of this matter on December 9, 2002, and oral evidence and documents were filed by the parties. The principals of the Employer did not attend the hearing. The Employer sent two employees, Carmen Johnson and Kerry Woolacott. These employees were co-workers of Ms. Ashdown, but had been promoted to management positions after Ms. Ashdown's employment was terminated.

The Delegate found that Ms. Ashdown worked from June 7, 2001 to June 24, 2002, primarily in the juice bar of the fitness centre operated by the Employer. Her initial rate of pay was $8.50 per hour, and this rate was increased in April of 2002 to $8.75 per hour.

The Delegate found that Carly Ashdown, was entitled to the sum of $1,022.86 as follows:

Wages	$68.00
Annual Vacation pay	$454.63
Overtime	$6.38
Compensation for length of service	$305.99
Other (statutory holiday pay)	$142.31
Other (uniform cost)	$24.00
Accrued interest under s. 88	$21.55

The Delegate also found that the Employer did not dispute the issues of overtime and annual vacation pay. The Delegate accepted the evidence of Ms. Ashdown, and the Employer presented no evidence related to the statutory holiday pay.

The significant issues before the Delegate appeared to be a wage claim for June 29, 30, 2001, the uniform cost claimed by Ms. Ashdown, and the claim for compensation for length of service.

Wage Claim:

The Delegate considered the oral evidence of Ms. Ashdown that she had not been paid for June 29 and 30, 2001. The Delegate also considered the pay stub dated July 13, 2001 which indicated that the wages had been held back. Ms. Ashdown testified that the writing on the pay stub was that of the owner Cindy Legare. The Delegate also considered Ms. Ashdown's work calendar, which was not disputed by the Employer. At the hearing the Employer took the position that Ms. Ashdown had not proven that the wages were not paid at a later date. The Delegate accepted the evidence of Ms. Ashdown and found that there was no indication that she had been paid for those dates.

Uniform Cost:

Ms. Ashdown claimed for the cost of two additional t-shirts, and one sweatshirt. The Delegate found that each employee was required to wear a black or white t-shirt, and black pants or shorts. The Delegate found that Ms. Ashdown was entitled to recover the costs of the t-shirts which she accepted as necessary, but not the costs of the sweatshirt. The Delegate referred to section 25 of the *Act*, which requires the Employer to provide the uniform at no cost to the employee if the employee is required to wear a uniform.

Compensation for Length of Service:

In making the Determination that the Employer had not proven cause, the Delegate referred to the burden resting with the Employer to establish cause. The Delegate also referred to the test required when the Employer seeks to rely on minor misconduct as the reasons justifying termination. In particular the Employer must show:

- A reasonable standard of performance was established and communicated to the employee; and
- The employee was given sufficient time to meet the standard; and
- The employee was notified that the job was in jeopardy by a continuing failure to meet the standard
- The employee continued to fail to meet the standard

The Delegate found that there was no clear indication that Ms. Ashdown was ever warned that her job was in jeopardy. The Delegate found that the Employer had not proven just cause for a dismissal.

The Delegate notes as part of his reasons:

> It is unfortunate that none of the principals of the company chose to attend the hearing and give evidence. There were numerous documents entered into evidence that Ms. Johnson and Mr. Woolacott alleged were given to Ms. Ashdown, but they did not give them to her. Both Ms. Johnson and Mr. Woolacott indicated that they had discussions with Ms. Ashdown regarding her attitude, poor work performance an tardiness. Again, none of these discussions took place when they were in a position of authority as both were promoted into management position after Ms.

> Ashdown was terminated. Ms. Ashdown denied receiving all of the warnings except those given on August 9 and 10, 2001.

It appears that there was a conflict in the evidence between Ms. Ashdown and the Employer's witnesses. The Delegate preferred the evidence of Ms. Ashdown in relation to warnings received by her.

Employer's Argument:

The Employer provided an appeal form which indicated under grounds of appeal that evidence became available which was not available at the time that the Determination was made. The explanation in support of this was as follows:

> I was out of the country and sent two employees in my place, since they observed Carly's behaviour from the beginning.

The Employer seeks to have the Tribunal vary or change the "uniform costs" and compensation charges. The Employer has also noted on the appeal form that

> This girl is an outright liar! She was late numerous times and was insubordinate allot of the time.

I note that this is the sole extent of the appeal submission filed by the Employer.

Employee's Argument:

The Employee argued that the Delegate had conducted a hearing, and the Employer had been provided an opportunity to attend the hearing. The absence of the Employer from the first hearing did not give rise to any legitimate argument that there was "new evidence". The Employee claims that much of the Employer's evidence that was presented at the hearing, was presented to her for the first time in that forum.

Delegate's Argument:

The Delegate provided the record that was before him. The Delegate made no submissions in this case as to the conclusion that I should arrive at on this appeal.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employer, to demonstrate an error such that I should vary or cancel the Determination. I note that the Delegate provided a reasoned decision, after hearing the evidence which was available. The Employer's submission is so bereft of detail, that it is apparent that it raises no issue of error. This appeal can be characterized as a frivolous appeal in the sense that the Employer has identified no evidence or argument which challenges the material points in the Determination, in any meaningful fashion. The Employer does not identify any errors in the Determination, in any meaningful way, that I can proceed to a consideration of error in the Determination. I do not propose to canvass all the evidence that was before the Delegate and re-weigh that evidence. I therefore dismiss the appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated December 27,2002 is confirmed, together with interest in accordance with section 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal