

An appeal

- by -

Fraser Valley Inn Ltd.
("FVI")

- 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/62

DATE OF DECISION: June 13, 2005

DECISION

SUBMISSIONS

Kamaal Samji	on behalf of Fraser Valley Inn Ltd.
Greg Brown	on behalf of the Director of Employment Standards
Leanne Wasylkiewicz	on her own behalf

OVERVIEW

This is an appeal by Fraser Valley Inn Ltd. ("FVI"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued March 18, 2005.

Leanne Wasylkiewicz filed a complaint with the Director alleging that FVI contravened the Act in failing to pay her overtime wages, statutory holiday pay and compensation for length of service. On February 16, 2005, the delegate held a hearing into Ms. Wasylkiewicz's complaint.

Ms. Wasylkiewicz appeared on her own behalf, FVI was unrepresented. Following that hearing, the Director's delegate found that FVI had contravened Sections 40, 45 and 63 of the *Act*, and Ordered that it pay \$1,615.81 in wages and interest to the Director on behalf of the complainant. The delegate also imposed a \$500 administrative penalty for each of the contraventions, for a total amount payable of \$3,115.81.

FVI contends that the delegate failed to observe the principles of natural justice in making the Determination, and seeks to have the Determination cancelled.

FVI did not seek an oral hearing, and I have determined, based on the submissions of the parties, that the matter can be adjudicated based on their written submissions.

ISSUE

Whether the delegate failed to observe the principles of natural justice in proceeding with the hearing in FVI's absence.

THE FACTS AND ARGUMENT

FVI operates a hotel, restaurant and beer store in Abbotsford. Nurdin (Dinu) Samji is the sole director of FVI, Kamal Samji is his nephew.

Ms. Wasylkiewicz worked for FVI as a bookkeeper from April 28, 2004 until August 5, 2004, at which time she was laid off. She filed her complaint on September 22, 2004.

A delegate of the Director initially attempted to resolve the matter through mediation. FVI did not attend a mediation session with an industrial relations officer on December 8, 2004, even though the records disclose it was notified of that opportunity by way of a fax on October 21, 2004. In the mediation notice, FVI was advised that, if the mediation was unsuccessful, the Director would appoint a delegate to adjudicate the complaint, and that the hearing would take place no later than February 8, 2004.

By way of a December 13, 2004 letter successfully faxed to FVI's business facsimile, the industrial relations officer advised FVI that the mediation had proceeded in FVI's absence, and that, although she had attempted on numerous occasions to contact both Mr. D. Samji and Mr. K. Samji, she had been unsuccessful in doing so. The delegate advised the Samjis that the next step in the process was adjudication of the complaint, but that it was still open to FVI to settle or mediate the complaint. Included as part of the 16 page fax was a notice of the hearing time, date and place. The Branch received no response to this letter.

On December 15, 2004, the Branch sent FVI a notice of the hearing date, time and place by registered mail (ExpressPost). Canada Post records disclose that the package was delivered that same day. No signature was required.

FVI did not appear at the time and date of the hearing. The delegate attempted to contact Nurdin Samji and Kamal Samji by telephone, and, when they did not answer left voice mail messages on their answering machines. Neither Mr. N. Samji nor Mr. K. Samji appeared or contacted the branch within one half hour of the call, and the delegate proceeded with the hearing in FVI's absence.

The delegate was satisfied that FVI had been notified of the hearing. He established that the hearing notice and demand for employer records had been delivered to FVI's address on December 15, 2004, and that telephone messages had been left for N. Samji and K. Samji.

Based on Ms. Wasylkiewicz's oral evidence and her payroll records, and in the absence of any employer records, the delegate determined that Ms. Wasylkiewicz had never been paid overtime wages or statutory holiday pay. The delegate also determined that Ms. Wasylkiewicz was laid off on August 5, 2004, and that her lay off exceeded more than 13 weeks in a 20 consecutive week period. Thus, her termination was deemed to be August 5, 2004. The delegate found that Ms. Wasylkiewicz had not been paid compensation for length of service.

Mr. Kamaal Samji contends that neither he nor Nurdin Samji had any knowledge of the February 16, 2005 hearing. He says the first he heard of the hearing was at 3:30 p.m. of that day when he retrieved his voice mail messages. He contends he immediately telephoned the delegate and was told the hearing had proceeded in his absence. He further contends that, when asked how he was informed of the hearing, the delegate said by registered mail and voice mail. Mr. Samji says he never received any registered mail.

The delegate submitted records showing that the notice of hearing was successfully delivered by registered mail to FVI's business address on December 15, 2004, and also successfully faxed to FVI on December 13, 2004.

The delegate says that FVI had every opportunity to appear and to submit employer records. In the absence of its failure to do so, the delegate contends that the Determination should be upheld.

By way of reply, Mr. Samji insists that he had no knowledge of the hearing. He also submits that, when he spoke to the delegate in December, 2004, she advised him that he would be advised of the hearing date by registered mail, and that he was “looking out for” a registered mail package but that it never came.

Ms. Wasylkiewicz also seeks to have the Determination upheld.

ANALYSIS AND DECISION

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

- (a) ...
- (b) the director failed to observe the principles of natural justice in making the determination;
or
- (c)

Section 77 provides that, if an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond. Section 77 is in keeping with the objectives of the *Act*, one of which is to provide for fair and efficient procedures for resolving disputes. (section 2, see also *Insulpro* BC EST #D405/98)

Although FVI was not “under investigation”, it was nevertheless the subject of a complaint made under section 74 of the *Act*. The adjudicative process followed by the Branch in this case was undertaken under section 76(2), which is under the heading “Investigations”. I find that the director had an obligation to make “reasonable efforts” to give FVI an opportunity to respond to the complaint, or in this case, of the opportunity to appear at the adjudicative hearing.

The evidence submitted by the delegate shows that a notice of the hearing was successfully transmitted to FVI by facsimile on December 13, 2004. Canada Post records also show that the notice of hearing was successfully delivered to FVI’s business address, which is the same address on the appeal documents, on December 15, 2004. The documents submitted by the delegate also show that the Branch made many attempts to communicate with FVI by telephone, fax and express mail both with respect to the initial complaint, the mediation session and the hearing. FVI responded to none of the Branch’s letters or telephone calls.

Although Mr. Samji acknowledges that Canada Post records appear to show that the documents were delivered to FVI, he contends that he did not receive them, saying that there was no signature on the documents acknowledging receipt. FVI’s submission is silent on the issue of the faxed documents.

FVI had knowledge of the complaint, as acknowledged by Mr. Samji in his appeal documents. Mr. Samji acknowledges that by at least December 2004, he became aware that a hearing would be held into Ms. Wasylkiewicz’s complaint. I infer this was a result of receiving a telephone call (even though the delegate says that Mr. Samji did not respond to any of the telephone calls), a letter or a facsimile transmission from the Branch. However, while Mr. Samji claims he was on the “lookout” for a hearing notice, it does not appear he was sufficiently concerned about the hearing into the complaint to either attempt to resolve it outside the hearing process or to follow up with the delegate about the hearing date and time when he had not received the notice by the end of January.

The Tribunal will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process. In *Tri-West Tractor Ltd.* (BC EST #D268/96), the Tribunal held that it would not allow appellants to “sit in the weeds”, failing or refusing to cooperate with the delegate during an investigation and then later file appeal of the Determination when they disagreed with it.

Notwithstanding Mr. Samji’s assertions that he had no knowledge of the hearing, I conclude that he did. I find that FVI demonstrated a refusal to participate in the mediation or hearing and deny the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated March 18, 2005, be confirmed in the amount of \$3,115.81, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal