

An appeal

- by -

James J. Douglas operating as The Pita Pit
(“Douglas”)

- 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: David B. Stevenson

FILE No.: 2002/624

DATE OF DECISION: March 11, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by James J. Douglas operating as The Pita Pit (“Douglas”) of a Determination that was issued on November 25, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Douglas had contravened Part 8, Section 63 of the *Act* in respect of the termination of employment of Mathew Tuchscherer (“Tuchscherer”) and ordered Douglas to cease contravening and to comply with the *Act* and *Regulations* and to pay an amount of \$541.14.

Douglas says the Director failed to observe principles of natural justice by failing to inform The Pita Pit it could make submissions and “did not investigate contrary evidence”.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue is whether Douglas has shown the Director failed to observe principles of natural justice in the investigation of the complaint.

FACTS

The Pita Pit is a restaurant. Tuchscherer worked at the restaurant from July 16, 2000 to April 30, 2002 doing food preparation. On or about April 30, 2002, Douglas purchased the business from Howe Enterprises Inc. Tuchscherer was employed at the restaurant at the time of the disposition.

The Determination made the following findings:

. . . I accept Mr. Tuchscherer’s evidence that he told Mr. Howe that he would not stay at the Pita Pit for long with the new owner. I also accept that he did not want to leave his employment until he was sure that he had successfully secured employment elsewhere. When he spoke with Mr. Douglas and asked for hours at the time the restaurant was changing hands, and then went back as instructed a few days later, he demonstrated a desire for employment, not an intention to quit. At that point, it was incumbent on Mr. Douglas to either give him hours or to terminate his employment as provided in the Act, either by giving him two weeks notice or compensation for length of service in lieu.

ARGUMENT AND ANALYSIS

Douglas says the Director failed to follow principles of natural justice “by not including, nor asking, for submissions” from him. He says he was never informed of his right to present evidence.

In reply, the Director has submitted copies of letters delivered to Douglas relating to the complaint, the first dated August 6, 2002 and the other dated October 16, 2002. The former letter provided an outline of

the allegations made by Tuchscherer, an overview of the applicable statutory provisions, comments from the Tribunal's decision *Lari Mitchell and others*, BC EST #D107/98, a statement of the likely result based on the allegations made and concluded with the following:

If you wish to dispute Mr. Tuchscherer's allegations, or you wish to discuss this matter with me, please contact me between the hours of 8:45 - 12:45 Monday to Friday.

The submission of the Director says there was also a telephone conversation Douglas and the investigating officer on August 7, 2002.

In a letter dated January 16, 2003, the Tribunal forwarded a copy of the Director's submission to Douglas. Included in the letter from the Tribunal was the following sentence:

If you wish to make a final reply please do so no later than **4:00 p.m. on January 31, 2003**.

No reply was received from Douglas to the Director's submission.

Section 77 of the *Act* states:

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

From my review of the material provided by the Director, it is indisputable that Douglas was given an opportunity to respond to the complaint. I do not accept his assertion that he was not asked for a submission. It is contradicted by the invitation contained in the letter dated August 16, 2002. Nor do I accept the suggestion that there is a broader obligation on the Director that includes an obligation to specifically advise a party that they may present evidence relating to the complaint.

The reasons for the appeal have not been established and it is dismissed.

I will add the following comments. Even if I accepted the Director had not provided Douglas with a reasonable opportunity to respond, or had otherwise contravened principles of natural justice, he has taken the opportunity through this appeal to submit his position on the complaint and, based on the contents of that submission, the appeal would be dismissed. There is nothing in the appeal which indicates the Director committed any error in deciding Douglas was liable for compensation for length of service to Tuchscherer. The appeal says:

If I was made aware I could provide submissions, I would have included documents that show two of Mr. Howe's former employees illustrating they were given two weeks verbal notice of their termination.

There are two problems with this position. First, verbal notice does not discharge an employer's liability under Section 63 of the *Act*. Notice of termination, to be effective in discharging an employer's obligation for compensation for length of service, must be written notice. Second, an allegation of verbal notice of termination is not, of itself, evidence of termination. In this case, even accepting the information provided with the appeal, there is no evidentiary basis for saying Tuchscherer was, for the purposes of the Act, terminated by Howe Enterprises Inc. prior to the disposition of its business and assets to Douglas.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 25, 2002 be confirmed in the amount of \$541.14, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal