

An appeal

- by -

610650 B.C. Ltd. o/a Priority Drugs
("Priority Drugs")

- 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: Ian Lawson

FILE No.: 2004A/24

DATE OF DECISION: May 21, 2004

DECISION

SUBMISSIONS

Richard Saunders	On behalf of the Director
George Wolsey	On behalf of Priority Drugs
Daniel M.L. Cook	On his own behalf

OVERVIEW

This is an appeal by 610650 B.C. Ltd. operating as Priority Drugs ("Priority") pursuant to section 112 of the *Act*. The appeal is from Determination ER#120-297 issued by Richard Saunders, a delegate of the Director of Employment Standards, on January 28, 2004. The Determination required Priority Drugs to pay wages, vacation pay, compensation for length of service and uniform cleaning costs to Daniel Cook ("Cook") in the total amount of \$457.51, together with administrative penalties in the amount of \$1,500.00.

Priority Drugs filed an appeal on February 4, 2004. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Priority Drugs operates a pharmacy in Surrey, and its director is George Wolsey ("Wolsey"). Cook was employed as a technician between July 17, 2002 and May 16, 2003. Cook filed a complaint with the Director that he was owed regular wages, vacation pay, compensation for length of service and uniform cleaning costs. The delegate elected to conduct an adjudication hearing regarding the complaint on September 19, 2003. The Determination sets out the following facts:

"A Notice of Hearing and Demand for Employer Records was sent via Registered Mail on August 27, 2003 addressed to Priority and Cook at their last known and confirmed address. Canada Post confirmed that the item has been successfully delivered to both customers.

"Employer records were to have been delivered no later than September 12, 2003. Records were received at the Employment Standards Branch on September 11, 2003.

"The Hearing was scheduled for September 19, 2003 at 9:00 AM.

"When no one appeared on behalf of Priority for the hearing at 9:00 a.m., another officer called the pharmacy at 9:10 a.m. and spoke to Ron (pharmacist). He responded that Wolsey was out making deliveries and did not mention anything to him about a hearing. Ron suggested calling Wolsey's pager. At 9:15 a.m. a call was made to the pager number with a detailed message regarding the Adjudication hearing. In the message a representative from Priority was invited to contact the officer before 9:30 a.m. at which point the hearing would commence. At 9:33 a.m. the hearing commenced.

"No further information was forthcoming."

The delegate then makes the following observations in the Determination:

“In the case at hand, both the general principles of natural justice and the specific provisions of the Act govern the Director in her decision-making. Procedural fairness requires that a person affected by an administrative decision knows that case against him or her and is given an opportunity to reply to it. Section 77 of the Act speaks to this principle in stating:

Opportunity to respond

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

“In complying with this principle, the right to notice is paramount. There is a requirement to give adequate notice to the parties whose interest may be substantially affected by the decision. This concept is intrinsically tied to the concept that the parties have the right to be present at the hearing. However, the right to be present is not absolute. In cases where the adjudicator is satisfied that a party has been properly served the notice and the party does not attend the hearing may proceed in the absence of one or the other party...”

The delegate then refers to the fairness and efficiency principles set out in section 2 of the Act and the service provisions set out in section 122, and states:

“Accordingly, as I am satisfied that the Notice of Complaint Hearing and Demand for Records was sent by registered mail to the Priority’s [*sic*] last known and confirmed mailing address, as per the notice from Canada Post I have concluded that these documents were deemed to have been served. I am satisfied that based on this finding and the finding that a notice was sent via registered mail that the employer was treated fairly and the principles of natural justice were applied. I make this finding, keeping in mind that one of the principles of the Act is to provide fair and efficient procedures for resolving disputes under the Act.” (Emphasis in original.)

The Notice of Appeal contains the following statement:

“We could not attend the scheduled hearing because of an emergency staff accident situation which was explained and did request rescheduling.”

In its submission, Priority Drugs states:

“... George Wolsey was not able to attend the September 19, 2003 hearing due to a motor vehicle accident that incapacitated the pharmacy technician/driver from working on Sep 19, 2003 [*sic*]. Because of short notice of the motor vehicle accident, George Wolsey, director, drove the pharmacist, Mark Gibson, who does not drive or possess a driver’s license due to his glaucoma.”

No other information is provided as to the circumstances that prevented anyone from Priority Drugs from attending the delegate’s adjudication hearing. In particular, Priority Drugs says nothing further about the allegation in the Appeal Form that it had explained the “accident situation” to the delegate and requested re-scheduling of the hearing.

The record delivered to the Tribunal contains nothing in the way of further communication from Priority Drugs following the messages left on the morning of the hearing.

ISSUE

Whether a breach of the principles of natural justice has occurred in relation to the non-appearance of Priority Drugs at the delegate's adjudication hearing.

ANALYSIS

Priority Drugs raises several issues in its appeal and submissions which attack the findings of fact made by the delegate, and which are directed at defending Cook's termination. None of the evidence and submissions it presents on this appeal was presented to the delegate. It is well-established in Tribunal decisions that an appellant may not normally introduce at an appeal evidence which could have been put before the delegate but was not (see *Tri-West Tractor Ltd.* BCEST No. D268/96, and *Kaiser Stables Ltd.* BCEST No. D058/97). If Priority Drugs is to succeed in presenting such evidence in this appeal, it must first provide a satisfactory explanation for its failure to attend the delegate's adjudication hearing. This question is conveniently addressed as whether a breach of the principles of natural justice occurred when the adjudication hearing proceeded in the absence of Priority Drugs.

While a motor vehicle accident which prevented a party from attending an adjudication would seem a good reason to allow that party to present new evidence on appeal, I am troubled by the following matters:

1. Pharmacy director Wolsey must have known of the adjudication hearing before embarking on the delivery with his pharmacist.
2. Why was that delivery more important for Priority Drugs than attending the adjudication hearing?
3. If the delivery was more important than the hearing, then why was no further information about the urgency of the delivery presented to the Tribunal?
4. Priority Drugs makes no response to the delegate's finding in the Determination that pharmacist "Ron" expressed no knowledge of Wolsey planning to attend the hearing that morning.
5. If Wolsey was planning on attending the hearing, why did he not contact the Director before embarking on the delivery? Why is there no evidence to support Wolsey's assertion that he had contacted the Director and requested re-scheduling?
6. No explanation is made for Wolsey's failing to respond to the pager message.
7. Why was no communication of any kind made by Priority Drugs to the Director in the nearly four months that elapsed between the hearing date and the date the Determination was made?

Of these matters, I find the last most troubling. A concerned party who unavoidably missed an important hearing might be expected to contact the decision-maker immediately, explain the difficulty and explore whether the situation is salvageable. Priority Drugs's delayed assertion of a valid reason for missing the hearing strikes me as disingenuous.

The lack of any explanation for these matters casts doubt on Priority Drugs's excuse for missing the adjudication hearing. The delegate was alive to the issue of procedural fairness, and correctly proceeded

with the hearing in the circumstances. Priority Drugs therefore fails to persuade me that it should now present evidence and argument that it ought to have presented at the adjudication hearing, and its appeal must be dismissed.

ORDER

Pursuant to section 115(1) of the Act, the appeal is dismissed and Determination ER#120-297 issued on January 28, 2004 is confirmed, with interest pursuant to section 88 of the Act.

Ian Lawson
Member
Employment Standards Tribunal