Employment Standards TRIBUNAL

An appeal

- by -

662372 B.C. Ltd. operating as Metropole Pub
("Metropole Pub")

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2005A/63

DATE OF DECISION: June 30, 2005

DECISION

SUBMISSIONS

Amman Rawji	on behalf of 662372 B.C. Ltd.
Lynne L. Egan	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by 662372 B.C. Ltd. operating as Metropole Pub ("Metropole Pub") of a Determination that was issued on March 23, 2005 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Metropole Pub had contravened Part 3, Sections 18, 21, and 27, Part 4, Section 40, Part 5, Section 46 and Part 7, Section 58 of the *Act* and Section 46 of the *Employment Standards Regulation* (the *"Regulation"*) in respect of the employment of Jennifer L. Openshaw ("Openshaw"), ordered Metropole Pub to cease contravening those provisions of the *Act* and *Regulation* and ordered Metropole Pub to pay Openshaw an amount of $1,346.64, an amount which included wages and interest.

2. The Director also imposed administrative penalties on Metropole Pub under Section 29(1) of the *Regulation* in the amount of $3500.00.

3. Metropole Pub says they have not been provided with a fair and adequate opportunity to be heard. The appeal seeks to have the administrative penalties cancelled and the wage claim varied.

4. The appeal submission includes an explanation for the failure of Metropole Pub to comply with a Demand for Employer Records and for the failure of a representative of Metropole Pub to appear at a complaint hearing as well as a submission on the merits of the claim by Openshaw for payment of unauthorized deductions. Metropole Pub has supported their appeal on the merits with a document that was apparently not submitted to the Director during the complaint process.

5. The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issues raised by this appeal are whether Metropole Pub was given a fair and adequate opportunity to respond the complaint filed by Openshaw and whether Metropole Pub has shown any error in the Determination.

THE FACTS

7. Metropole Pub is a liquor establishment in a hotel. Openshaw was employed by Metropole Pub from May 28 to August 24, 2004. She filed a complaint alleging Metropole Pub had contravened the *Act* by failing to pay regular and overtime wages and statutory holiday pay. She also alleged Metropole Pub had made unauthorized deductions from her wages.

8. The Determination notes Metropole Pub and Openshaw attended an unsuccessful mediation session in November 2004. A complaint hearing was scheduled for January 12, 2004. That hearing date was adjourned at the request of Metropole Pub, as its representative was scheduled to be out of town on that date. The complaint hearing was rescheduled for March 15, 2005. A Demand for Employer Records and a Notice of Complaint Hearing were sent by the Director by registered mail to Metropole Pub, at its business address, and to its officers and directors at their residential address, which is also the registered and records for the company. The record shows delivery of those documents was made to both addresses on February 11, 2005.

9. No records were received in response to the Demand and no representative of Metropole Pub attended the complaint hearing.

10. The complaint hearing was commenced and completed in the absence of any representative of Metropole Pub. The Director received evidence from Openshaw and made findings of fact on that evidence resulting in the Determination under appeal.

ARGUMENT AND ANALYSIS

11. Metropole Pub has the burden of persuading the Tribunal there is a reviewable error in the Determination. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

> *112.(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

12. As noted above, Metropole Pub seeks to have the Tribunal review the Determination and vary it by reducing the amount of wages found owing and by cancelling the administrative penalties.

13. Metropole Pub says there is evidence that has become available that was not available when the Determination was made. They infer this evidence was not presented to the Director because the Demand for Employer Documents and Notice of Complaint hearing were not received before the Determination was issued.

14. The Tribunal has taken a relatively strict view of the "new evidence" ground of appeal, indicating in several decisions that it is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal retains a discretion to allow new evidence. In addition to considering whether the evidence was reasonably available and could have been provided during the complaint process, the Tribunal also considers whether the evidence is relevant to a material issue arising from the complaint and if it is credible, in the sense that it is reasonably capable of belief.

15. The evidence which Metropole Pub seeks to submit to the Tribunal consists of a "Letter of Termination", dated August 11, 2004, in which Openshaw agrees she has been paid all "pay and vacation pay" owed by

Metropole Pub and agrees that any IOUs, debts or advances have been paid off or deducted "as authorized".

16. The Director objects to the introduction of that evidence, arguing the document was available at the time of the complaint hearing and should have been submitted at that time. The Director says, in any event, the document would not have changed the Determination.

17. It is clear this evidence was available to Metropole Pub before the Determination was made and could have been provided to the Director. On that basis alone, I find Metropole Pub has not met the applicable ground of appeal. It is also clear that the document was created after Openshaw terminated her employment with Metropole Pub. The circumstances of its creation are not in evidence for obvious reasons - Metropole Pub did not attend the complaint hearing, but on its face the document would not survive the prohibition found in Section 4 of the *Act*, making it irrelevant to the validity of the claims made by Openshaw and providing an additional reason for the Tribunal not allowing the document to be introduced into this appeal.

18. Metropole Pub says the Demand for Employer Records and Notice of Complaint hearing were not received and they were unaware of the rescheduled hearing. The explanation given in support of that assertion is that "Rawji" did not return to the office until February 15th 2005 from being away in January and "was out of the office again from February 23rd, 2005 until March 17th, 2005". The appeal does not provide any explanation why registered mail delivered to the business address of Metropole Pub and to the residential address of the company's directors and officers was not viewed by its representative (or by the other director and officer of Metropole Pub for that matter) during the period from February 15 to February 23.

19. The Demand was delivered by registered mail and was deemed to have been served by operation of subsections 122(1) and (2) of the *Act*. The failure to comply with the Demand is a contravention of the *Act* and *Regulation*. The information which they seek to rely on in this appeal was part of the Demand and should have been provided to the Director as required by the *Act*. Even in this appeal, Metropole Pub has only submitted one document of those which fell within the scope of the Demand and which were required to be produced by them.

20. In respect of the complaint hearing Notice, the evidence indicates it was also delivered to Metropole Pub, and its directors and officers by registered mail. The delivery by the Director by registered mail of the Notice, as well as the service of the Demand and the attempt to mediate a settlement of the claim, satisfies the statutory requirement on the Director in Section 77 of the *Act* to *"make reasonable efforts to give the person under investigation an opportunity to respond"*.

21. In the circumstances, there is a strong presumption of effective service of the Notice and a consequent inference that the failure to appear at the complaint hearing was conscious and deliberate. That presumption may be rebutted by Metropole Pub providing convincing evidence showing the Notice was not served or that the service was not effective and was insufficient to bring the information regarding the hearing to their attention. Placing such a burden on Metropole Pub in this case is consistent with the objectives and stated purposes of the *Act*. Metropole Pub has not met that burden.

22. I find, as a result, that the Director made reasonable efforts to provide Metropole Pub with an opportunity to respond and that Metropole Pub was provided a "fair and adequate" opportunity to respond to the complaint but failed or refused to use that opportunity. The Tribunal has consistently resisted attempts to

have the merits of a complaint re-visited on appeal where the appellant has failed or refused to participate in the complaint process (see *Tri-West Tractor Ltd.,* BC EST #D268/96 and *Kaiser Stables Ltd.,* BC EST #D058/97).

23. The appeal on the merits of the Determination is dismissed.

24. On the matter of the administrative penalties, Metropole Pub has argued that because they offered to pay all of the wages claimed, except for the wage claim relating to unauthorized deductions, it is unfair to impose administrative penalties in the amount of $3500.00. Setting aside whether it is even appropriate or allowable to raise matters that took place during unsuccessful efforts to settle the complaint, the fact is there was no settlement of any part of the complaint. As a result, the Director was required to consider the claims made by Openshaw and issue a Determination relating to them, which in this case included finding that Metropole Pub had contravened the provisions of the *Act* listed in the Determination.

25. In the *Marana Management Services* decision, the Tribunal stated:

> Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are mandatory . . .

26. That comment has been echoed in several other decisions of the Tribunal (see, for example, *Virtu@lly Canadian Inc. operating as Virtually Canadian Inc.,* BC EST #D087/04, *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST #D160/04, and *Kimberly Dawn Kopchuk*, BC EST #D049/05. In considering an appeal of administrative penalties, as with an appeal of any other aspect of a Determination, an appellant is limited to the grounds of appeal set out in Section 112(1) of the *Act*, above. Metropole Pub has not shown the Director made any error in imposing the administrative penalties.

27. This aspect of the appeal is also dismissed.

ORDER

28. Pursuant to Section 115 of the *Act*, I order the Determination dated March 23, 2005 be confirmed in the total amount of $4,846.64, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal