

An appeal

- by -

Ken Eng

- 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:** Yuki Matsuno

**FILE No.:** 2008A/66

**DATE OF DECISION:** September 11, 2008

## DECISION

### SUBMISSIONS

Ken Eng	for himself
Sam Anderson	for 0698094 B.C. Ltd carrying on business as Anderson by Design
Ed Wall	for the Director of Employment Standards

### OVERVIEW AND BACKGROUND

1. This decision completes an appeal filed by Mr. Eng regarding a determination issued by the Director of Employment Standards (the “Director”) on January 21, 2008 (the “Determination”) which decided a complaint filed by Mr. Eng with the Employment Standards Branch on October 25, 2007. After investigating the complaint, a delegate of the Director of Employment Standards (the “Delegate”) found in the Determination that the *Employment Standards Act* (the “Act”) had not been contravened and no wages were outstanding.
2. Mr. Eng appealed the Determination to the Tribunal. I decided the appeal (the “Decision”) and confirmed the Determination save for the following: I found that the Delegate failed to observe the principles of natural justice when he failed to address in the Determination Mr. Eng’s allegations that he had been mistreated because he complained under the *Act*, contrary to section 83. I referred this matter back to the Director for further investigation. I also ordered that the Determination be varied to indicate Mr. Eng’s entitlement to vacation pay for July 2007 to be in the amount of \$29.02, along with any interest payable under section 88(1), with the date of payment set at February 26, 2008.
3. On April 30, 2008, the Tribunal forwarded the Decision to the parties and noted that the Determination was being referred back to the Director. In response to the referral back, the Delegate, on behalf of the Director, issued a report dated June 19, 2008 (the “Report”). The Tribunal forwarded the Report by letter dated June 2, 2008 to Mr. Eng and 0698094 B.C. Ltd carrying on business as Anderson by Design (the “Employer”) and offered them an opportunity to submit a reply, along with a copy of any records and documents in support. Mr. Eng replied by letter dated July 22, 2008 and the Employer replied by letter dated August 6, 2008.

### ISSUE

4. Are the conclusions reached in the Report correct, and should the Determination be confirmed, varied or cancelled as a result?

### THE REPORT AND THE REPLIES

5. In the Report, the Delegate addressed two issues: (1) Was there a breach of section 83? (2) What was the amount of interest, if any, owing to Mr. Eng for the July 2007 vacation pay?

6. With respect to the latter issue, the Delegate calculated the interest owing on Mr. Eng's vacation pay to be 62 cents. Neither party takes issue with this conclusion. Mr. Eng says that he has not received a cheque for this amount from the Employer. Mr. Anderson on behalf of the Employer says that a cheque was sent to Mr. Eng at his last known address and that he is willing to send a certified cheque by mail, if needed. I trust that the parties, with the assistance of the Delegate if necessary, will be able to sort out the matter of payment.
7. With respect to section 83, the *Act* provides:
  - 83(1) An employer must not
    - (a) refuse to employ or refuse to continue to employ a person,
    - (b) threaten to dismiss or otherwise threaten a person,
    - (c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or
    - (d) intimidate or coerce or impose a monetary or other penalty on a person,because a complaint or investigation may be or has been made under this *Act* or because an appeal or other action may be or has been taken or information may be or has been supplied under this *Act*.
8. At the beginning of his investigation of Mr. Eng's complaints regarding section 83, the Delegate asked him to provide "details of his allegations, the names of any persons who may have witnessed the behaviour he alleged and any evidence that the alleged behaviour was motivated by grounds prohibited in section 83." Mr. Eng responded by outlining three actions that he alleged were contraventions of section 83:
  1. A subcontractor of the Employer told Mr. Eng that if he hired Mr. Eng, Sam Anderson, the owner of the Employer would "make his contract obligations difficult";
  2. A supervisor employed by the Employer assaulted Mr. Eng at a local pub;
  3. In response to Mr. Eng's original appeal, Mr. Anderson requested the Tribunal to have Mr. Eng's name be flagged in order to save future employers time and frustration.
9. The Delegate then proceeded to contact the subcontractor and the supervisor to ask them about the allegations. In the report the Delegate analyzes the evidence he collected and concludes that no breach of section 83 was proven. He finds that there was no evidence the subcontractor's refusal to hire Mr. Eng, or the supervisor's participation in the altercation with Mr. Eng, were in any way motivated by a complaint or investigation under the *Act*, by an appeal or other action taken under the act, or by information supplied under the *Act*. The Delegate finds that while Mr. Anderson's request to flag Mr. Eng's name was "unusual and inappropriate", it does not make out a breach of section 83. The Delegate points out that in order to find a contravention of section 83, not only does it have to be shown that an employer carried out one of the prohibited actions, but it also must be shown that the actions were motivated by the employee's attempts to access his or her entitlements under the *Act*.
10. Mr. Anderson, writing in response on behalf of the Employer, expresses no objection to the Report.
11. Mr. Eng disagrees with the Report. Although I have read the whole of his submissions, here I will outline only those points that are relevant to section 83. Mr. Eng suggests that the Delegate had some obligation to inform the subcontractor about Mr. Eng's Employment Standards complaint and implies that the subcontractor's lack of knowledge was the Delegate's responsibility. He says that the supervisor was

aware of Mr. Eng's complaint because he was present on the day that Mr. Eng delivered the complaint to the Employer and that it was a common topic of discussion between him and the supervisor, as their hotel rooms were next door to each other. He disagrees with the conclusion that the request to flag his name was not an act that contravened section 83. Mr. Eng also says that he was not given an opportunity on May 28 to provide further information, contrary to the Delegate's statement in the Report. With respect to the latter allegation, without making any finding on the issue, I consider Mr. Eng's opportunity to respond to the Report to be adequate opportunity for him to put forward all of the information in support of his case.

## ANALYSIS

12. That matter was referred back to the Director under the statutory authority given to the Tribunal in Section 115 of the *Act*, which states:

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

13. In *Hub-City Boat Yard Ltd.* #D028/04, the Tribunal articulated its practice with respect to matters that are referred back:

The legislature empowered the Tribunal to refer a matter back to the Director in cases where the Determination under appeal could not properly be confirmed, varied or cancelled, and where a reinvestigation or reconsideration is required, with directions (see *Re Zhang*, BC EST #D130/01). The Tribunal's decision will normally identify the errors made in the Determination, and the referral back is normally an opportunity for the Director to remedy those errors and arrive at a correct Determination. A practice has arisen, however, in which the Director makes a report back to the Tribunal instead of a new Determination, and in that report, the Director outlines the results of its reinvestigation or reconsideration. This practice renders the process more efficient, as the Tribunal is placed in a position to confirm, vary or cancel the Determination with the benefit of the Director's reinvestigation and reconsideration, but without the delay and expense involved with the making of a new Determination (with a new right of appeal).

14. In this case, the burden rests on the parties to show that the referral back report is incorrect. The only contested issue is whether the Delegate's conclusions with respect to section 83 are correct. Regarding section 83, the Tribunal held in *Cameron*, BCEST #RD100/06 (reconsideration of BCEST #D76/06) that:

The Tribunal has consistently held that to succeed in establishing that an employer has contravened section 83 an employee must show that the actions of the employer were motivated at least in part by the prohibited ground. There must be "some evidence" that the actions were motivated by the prohibited ground: *Zolton Kiss*, BC EST # D122/96 [(reconsideration of BCEST #091/96)].

15. In this case, there is no objective evidence that any employer contravened section 83. With respect to the subcontractor, the Delegate found no evidence to show that his refusal to hire Mr. Eng was motivated by any knowledge of Mr. Eng's Employment Standards complaint. The subcontractor simply did not know about the complaint and regardless of Mr. Eng's allegation that the Delegate should have informed the

subcontractor about it (in my view, the Delegate has no such obligation), there is no evidence that the subcontractor acted with improper motive.

16. With respect to the supervisor, the Delegate found that whatever the cause of the altercation between him and Mr. Eng (not surprisingly, they put forward different versions of the altercation and its cause), there is no evidence that the altercation took place because of any action Mr. Eng was taking under the *Act*. Mr. Eng alleges in his reply that contrary to the supervisor's statement to the Delegate, the supervisor knew about Mr. Eng's complaint. Even if that were so (and no such finding is made here), mere knowledge of the complaint does not necessarily constitute evidence that the employer's action was motivated by the complaint. Further, speaking more broadly, it should be remembered that the supervisor is not an employer; he is an employee of the Employer. There is no evidence that the supervisor was acting on behalf of the Employer during the altercation. In other words, there is simply no evidence that the altercation was the action of an employer motivated by an employee's access to or potential access to Employment Standards entitlements.
17. I agree with the Delegate that Mr. Anderson's request to have Mr. Eng's name flagged, made in the course of correspondence with the Tribunal with respect to the original appeal, does not constitute a contravention of section 83.
18. Having reviewed the delegate's decision on the referral back, and the submissions of the parties, I confirm the Report and find no basis to interfere with the conclusions found within.

## **ORDER**

19. Pursuant to Section 115 of the *Act*, I order that that the Delegate's referral back report, dated June 19, 2008, and the Determination dated January 21, 2008 be confirmed.

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**Yuki Matsuno**  
**Member**  
**Employment Standards Tribunal**