

An appeal

- by -

Alano Club of Chilliwack operating as Alano Club Coffee Bar

- 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:** John Savage

**FILE No.:** 2005A/81

**DATE OF DECISION:** July 6, 2005

## DECISION

### SUBMISSIONS

Bill Higginbottom, for the Alano Club of Chilliwack

Janet Angers, for herself

Greg Brown, for the Director of Employment Standards

### OVERVIEW

1. The complainant Janet Angers (“Angers”) filed a complaint under the *Employment Standards Act* (the “Act”) alleging that her former employer the Alano Club of Chilliwack (“Alano Club”) contravened the Act by failing to pay her compensation for length of service upon termination.
2. A mediation session was held on December 16, 2004 and when mediation failed a Notice of Complaint Hearing and Demand for Employee Records was hand delivered to Bill Higginbottom, the then President of the Alano Club.
3. On the date of the hearing, March 1, 2005, no representative of the Alano Club appeared for the hearing. Telephone messages were left for the then current President and Manager on the morning of the adjudication hearing, but there was no appearance on behalf of the Alano Club.
4. The Delegate then proceeded to hear the complaint. He heard the evidence of the complainant and Veronica Volk, a former Vice-President of the Alano Club and club member.
5. The Delegate found that the Alano Club terminated Angers and failed to give Angers written notice or compensation for length of service as required by Section 63 of the Act. The Delegate found that the Alano Club owed Angers \$1,310.40 as compensation for length of service and vacation pay.
6. As there was a breach of section 63, the Alano Club was ordered to pay an administrative penalty of \$500.00 pursuant to section 29(1) of the *Employment Standards Regulation*, BC Regulation 396/95 as amended.
7. The Alano Club appeals on the ground that evidence has become available that was not available at the time the Determination was made. Together with the appeal the Alano Club filed two notarized declarations, one from Bill Higginbottom and one from Mike Michie setting out the Alano Club’s version of events based on the eyewitness accounts of Higginbottom and Michie.

### ISSUE

8. Should new evidence be received in these circumstances?

## LEGISLATION

9. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
  - (b) the director failed to observe the principles of natural justice in making the determination;  
or
  - (c) evidence has become available that was not available at the time the determination was being made.
10. The burden of establishing that a Determination is incorrect rests with an Appellant: *Natalie Garbuzova* BC EST #D684/01.
11. With respect to Subsection 112(1)(c), this Tribunal has established the test for the reception of new evidence in a number of cases. The Tribunal has considered the circumstances in which new evidence will be admitted in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03. The Tribunal set out four conditions that must be met before new evidence will be considered.
12. The appellant must establish that:
- 1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - 2. the evidence must be relevant to a material issue arising from the complaint;
  - 3. the evidence must be credible in the sense that it is reasonably capable of belief; and
  - 4. the evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
13. With respect to this test, I have no difficulty in finding that the statements, addressing the issues as they do, are material and credible in the sense that they are reasonably capable of belief. The evidence has probative value, and would have provided the Delegate with conflicting information on a critical issue.
14. It is my opinion, however, for the reasons that follow, that this evidences fails to meet the first requirement noted above.

## DISCOVERY BY DUE DILIGENCE

15. The information contained in the notarized declarations simply gives a version of event from two of the principals or past principals of the Alano Club. It refers to events that occurred in 2004. This evidence was available at the time of the investigation and adjudication of the complaint and should have been presented to the Delegate hearing the complaint. For unexplained reasons the Alano Club did not appear at the hearing of the complaint.

16. An appeal to the Employment Standards Tribunal is not an opportunity to present evidence that should have been presented to the Delegate or Director at the hearing of the complaint. An appeal to the Tribunal is a limited appeal, directed towards curing errors of law in the adjudication of the complaint, breaches of natural justice in the hearing of complaints, or to curing defects in the proceeding where new evidence becomes available to a party.
17. For example, the Tribunal will not allow an employer who refuses to participate in the Director's investigation to file an appeal on the merits of the determination: *Re Syncon Investments Ltd.*, BC EST #D 094/97. An appeal is not a trial de novo: *Re World Project Management Ltd.* BC EST #D 134/97.
18. The key aspect on issues seeking to introduce new evidence is that the new evidence was not available at the time the Determination was made: *Re Merilus Technologies Inc.* BC EST #D 171/03.
19. In the circumstances, the evidence sought to be presented is not new evidence that could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint.
20. The Appeal is dismissed.

## **ORDER**

21. I Order, pursuant to section 115 of the *Act*, that the Determination, dated April 8, 2005, be confirmed.

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**John Savage**  
**Member**  
**Employment Standards Tribunal**