

An appeal

- by -

Flour Child Bakeries Corp.
("Flour Child")

- 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: Shafik Bhalloo

FILE No.: 2006A/88

DATE OF DECISION: September 20, 2006

DECISION

SUBMISSIONS

Mark Hitchon	on behalf of Flour Child Bakeries Corp.
Mellissa Howe	on her own behalf
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Flour Child Bakeries Corp. (“Flour Child”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued on July 13, 2006 (the “Determination”) by a delegate of the Director of Employment Standards (the “Director”).
2. In the Determination, the delegate for the Director ordered that Flour Child pay to its former employee, Mellissa Howe (“Howe”), \$436.00 for compensation for outstanding wages; \$17.44 for vacation pay, and \$22.91 for interest pursuant to sections 58, 63, and 88 of the *Act*.
3. The appeal was brought by Flour Child on the grounds that the Director erred in law and also failed to observe the principles of natural justice in making the Determination.
4. On the Appeal Form, Flour Child did not request an oral hearing and the Tribunal has decided an oral hearing is not necessary in order to adjudicate this appeal.

ISSUES TO BE DETERMINED

5. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director as follows:
 - 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.
6. In paragraph 2 of the Appeal Form there are three boxes identifying grounds of appeal and Flour Child has checked the boxes stating that the Director erred in law and failed to observe the principles of natural justice in making the Determination. Accompanying the Appeal Form of Flour Child is a handwritten document containing submissions of Flour Child (the “Submissions”) prepared by its principal, a Mr. Mark Hitchon. In the Submissions, Mr. Hitchon states: “...I believe that the (delegate of the Director) took the easiest and laziest approach to this claim. If she had contacted the proper people I suggested then

she might have received the real truth to the history of Melissa's employment." Mr. Hitchon subsequently delineates some additional evidence in the Submission (which I will review more specifically later in my decision). However, it is unclear from the Determination or the Record of the Director whether Flour Child provided such evidence to the Director in advance of the Determination.

7. Although on the Appeal Form Flour Child indicated that the basis for its appeal was a denial of natural justice and error in law, it is apparent from Flour Child's submissions that some additional, possibly new, evidence is proffered in support of its appeal. On that basis, the grounds for appeal are more appropriately characterized as an allegation that the Director erred in law [section 112(1)(a)]; failed to observe principles of justice [section 112(1)(b) or possibly that there is "new evidence" [section 112(1)(c)].
8. In *Triple S Transmission Inc.* (BCEST # D141/03), the Tribunal member expressed the view that the Tribunal should not "mechanically adjudicate an appeal based solely on the particular 'box' that an appellant has checked off". The Tribunal member further stated that:

When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, prima facie, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

9. I concur with the Tribunal member in *Triple S Transmission Inc.* that "a large and liberal view" should be taken, and therefore propose to address each of the statutory grounds of appeal and decide the following three issues on this Appeal:
 - (a) Did the director err in law in making the Determination?
 - (b) Did the director fail to observe the principles of natural justice in making the Determination?
 - (c) Is there new evidence, which has become available that was not available at the time the Determination was made?

FACTS

10. The employee, Mellissa Howe, was hired as a decorator to work in a bakery operated by Western Everfresh Bakeries ("Western Everfresh") as of May 4, 2005.
11. In early May 2005 Western Everfresh was experiencing some financial difficulties.
12. In or around the same time, a Writ of Seizure and Sale (the "Writ") was issued against Everfresh in an action commenced by WCB.
13. On May 5, 2005 the Okanagan Court Bailiffs (the "Bailiff") received the Writ for execution.
14. On May 11, 2005 the Bailiff established a list of assets of Everfresh.
15. In or around the same time, a Ms. Janet Barnes, who was the wife of one of the principals of Everfresh and worked at the Everfresh bakery, informed the Bailiff that Mr. Mark Hitchon would be purchasing the

assets of Everfresh and the funds realized from the sale of the assets would be used to satisfy the debt of Everfresh to WCB.

16. Subsequently, Mr. Hitchon purchased the assets of Everfresh for a price of \$9,096.40 and the Bailiff received the said amount in satisfaction of the Writ pertaining to the WCB debt. Ms. Barnes produced to the delegate of the Director an unexecuted copy of the asset sale agreement between Everfresh and Mr. Hitchon (in trust for a new company to be formed at a later date) delineating the purchase price of \$9,096.40. Although neither Everfresh nor Mr. Hitchon produced the executed agreement, there does not appear to be a dispute between the parties that Mr. Hitchon agreed to and purchased the assets of Everfresh for the sum of \$9,096.40.
17. After the sale of the assets of Everfresh to Mr. Hitchon, some time in the latter part of May 2005, Ms. Barnes informed Ms. Howe that Everfresh was being sold and in June 2005 introduced Mr. Hitchon as the new owner.
18. On June 1, 2005 Mr. Hitchon advanced another sum of \$2,920.21 to Everfresh to assist it with rent but the cheque was returned marked "Payment Stopped".
19. On June 3, 2005 Ms. Barnes went on vacation and a Ms. Ardith Thomas, the wife of another principal of Everfresh, became involved in the bakery taking over Ms. Barnes' responsibilities.
20. On June 13, 2005 when Ms. Barnes returned from her vacation she was informed by one of the employees that Mr. Hitchon had changed the locks to the bakery. When Ms. Barnes went to the bakery with her husband, the Barnes discovered that Mr. Hitchon had indeed changed the locks and a confrontation ensued between the Barnes and Mr. Hitchon. The Barnes told Mr. Hitchon that if he paid Everfresh for rent, inventory and payroll expenses up to June 14, 2005 they would sever their involvement in the bakery.
21. On June 14, 2005, Everfresh paid up to date wages to all employees including Ms. Howe and issued them Records of Employment of same date.
22. After June 14, 2005, the Barnes were not involved in the operation of the bakery, although one of the principal's of Everfresh, a Mr. Bill Thomas, continued at the bakery in the capacity of a baker.
23. On June 15 or 16, 2005 Mr. Hitchon advanced \$15,000 to Everfresh.
24. On June 17, 2005, Flour Child was incorporated and Mr. Hitchon was its sole director and officer.
25. Ms. Howe believed that her employer as of June 15, 2005 was Flour Child.
26. The name of the products at the bakery had changed to Flour Child.
27. The time sheets Ms. Howe and other employees were required to fill out at the bakery after June 15, 2005 had Flour Child's name on them.
28. Natures Fare, one of the customers of the bakery, stated that the last cheque paid to Everfresh was on June 10, 2005 and as of June 13, 2005 all invoices were from Flour Child and all payments by Natures Fare were made to Flour Child. The Nature's Fare bakery manager also stated that he understood that Hitchon was the new owner and two or three weeks before the closure of the bakery Hitchon was involved in the

bakery. Hitchon visited Natures Fare with Ms. Barnes to discuss new products and displays because Hitchon was intending to expand the business.

29. Another customer of the bakery, Swan Lake Nurseryland, was informed in mid-June that the bakery was sold and its name changed from Western Everfresh to Flour Child. Thereafter, Swan Lake paid for products it purchased to Flour Child.
30. Costco and Woody's pub, two other customers of the bakery, also received invoices from Flour Child.
31. On June 24, the bakery stopped operating and Flour Child removed the assets that Mr. Hitchon had previously purchased from Everfresh.
32. Ms. Howe continued working at the bakery after June 14, 2005 until its closure but was not paid for wages earned after June 14, 2005.
33. On or about July 14, 2005 Ms. Howe filed a complaint under section 74 of the *Act* alleging that Flour Child contravened the *Act* by failing to pay her wages earned after June 14, 2005.
34. Neither Everfresh nor Flour Child dispute that Ms. Howe is owed wages for work performed after June 14, 2005; however, both argue that the other is responsible for the payment of the wages.
35. The delegate for the Director investigated the complaint in and during July 2005 and August 2005 and issued the Determination on July 13, 2006.
36. Flour Child appealed the Determination on July 17, 2006.

ARGUMENT

Appellant's Submissions

37. Mr. Hitchon, on behalf of Flour Child, wrote in the Submissions:
 - 1) Flour Child (my company) never had the opportunity to close on me buying Western Everfresh. True \$25,000 dollars was given by Flour Child to the principles(sic) of Western Everfresh with the intent to close the business.
 - 2) If I was in fact the owner of this business and therefore responsible for the employees why was I:
 - a) not yet the legal tenant
 - b) locked out of the premises by an officer of Western Everfresh
 - c) not given the sales money derived from sales during the time of Melissa's employment (except \$600 dollars) Sales were over \$20,000 per month
 - d) licenses, GST, PST, business licenses, insurances not in the name of Flour Child
 - e) my lawyer was waiting for instructions to close the business. These points and many more clearly show that Western Everfresh was still the owner of the business and therefore responsible for the employees

38. Mr. Hitchon then goes on to note that:

The bottom line here is that I paid \$25,000 to try to buy the bakery. Anticipated on closing...started the process of turning over ownership but my money was stolen, the sales receipts were given to Western Everfresh, the employees, rent and utilities were paid by Western Everfresh cheques and the principles of Western Everfresh locked me out of the bakery.

Director's Submissions

39. The Director's delegate submitted that Mr. Hitchon, on behalf of Flour Child, has not set out any reasons to support his claim that there was a denial of natural justice or an error of law. The delegate admits that during the investigation Mr. Hitchon stated that she would receive "the real truth" if she contacted the "proper people" but Mr. Hitchon did not explain whom he was referring to or what evidence they had or would provide. The delegate of the Director also pointed out that Mr. Hitchon asked that she deal with the principals of Everfresh but did not provide their names or contact information.

Respondent's Submissions

40. Ms. Howe reiterated that during the final two weeks of her employment at the bakery she was working for Flour Child. The name Flour Child was on the time sheets and the bun tags that she shipped out. She reiterated that Mr. Hitchon was introduced to her once and she was told he was the new owner.

ANALYSIS

Natural Justice

41. The first ground of appeal of Flour Child is based on the allegation that the delegate for the Director failed to observe the principles of natural justice. Principles of natural justice are essentially procedural rights that ensure that parties have a right to be heard by an independent decision maker. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated* BC EST # D050/96).

42. The burden rests with the party alleging an error of natural justice, to demonstrate that error. There is nothing apparent on the record in this case which persuades me that there was an infringement of the principles of natural justice. Flour Child through its principal, Mr. Hitchon, participated in the investigation by the delegate of the Director and was afforded an opportunity to respond to the allegations in the complaint.

43. While Mr. Hitchon takes issue with the findings which were made by the delegate for the Director in the Determination and the manner in which she conducted her investigation leading to the Determination, Mr. Hitchon has not presented any evidence and made no submissions to support the assertion that the delegate had failed to observe the rules of natural justice. The appeal cannot succeed on this ground.

Error in Law

44. The second ground of appeal of Flour Child is based on error in law on the part of the Director.
45. In the Determination, the Director's delegate correctly identified and applied the relevant sections of the *Act*, namely, section 1 containing the definitions of “employer” and “employee” as well as section 97 of the *Act* governing sale of business or assets to the facts in this case.
46. Mr. Hitchon provided no clear and compelling evidence that the delegate erred in her conclusion that Flour Child was Ms. Howe’s employer after June 14, 2005. Mr. Hitchon instead seeks to re-assert the facts as he sees them, rather than as the Director found them, and requests that the Tribunal reach a different conclusion on those facts. The Tribunal decided in *Britco Structures Ltd.* BC EST # D260/03, that this kind of circumstance does not support a determination that there has been an error of law, but instead alleges an error in findings of fact. An error in findings of fact is not one of the ground on which an appeal may be based pursuant to section 112 of the *Act*.
47. This is not a situation where the Director made findings of fact in the absence of any evidence. The only basis for attacking the findings made by the delegate for the Director is to show that the delegate took a view of the facts that could not reasonably be entertained based on the evidence. Clearly there was evidence, which is identified in the Determination, which reasonably supported the Director's conclusion. Accordingly, I am unable to find the Director erred in finding that Flour Child was Ms. Howe’s employer after June 14, 2005. In my view, the delegate applied the law correctly in arriving at her conclusion.

New Evidence

48. While this ground was not checked on the Appeal Form, Mr. Hitchon appears to have adduced some new evidence, which I have set out under the heading “Appellant’s Submission” at paragraphs 37 and 38.
49. The conditions that must be met before new evidence will be considered are set out by the Tribunal in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03. The appellant must establish all four requirements, namely:
- * 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;
 - * the evidence must be relevant to a material issue arising from the complaint;
 - * the evidence must be credible in the sense that it is reasonably capable of belief; and
 - * 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.
50. The evidence Mr. Hitchon now seeks to present (delineated in in paragraphs 37 and 38) does not meet the test for new evidence as set out in the *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.* case, *Supra*, as it is the type of evidence that was or would have been discoverable or available, with the exercise of due diligence, to Mr. Hitchon and Flour Child at the time the investigation was conducted by the delegate for the Director. An appeal is not intended to be a second opportunity for

the appellant to present its case. In addition, I am not persuaded that the new evidence is of such high probative value that it could have resulted in a different conclusion on the material issue in this case-i.e. Who was Ms. Howe's employer after June 14, 2005? Accordingly, the appeal is also dismissed on the ground that there is new evidence that has become available that was not available at the time the Determination was made.

ORDER

- ^{51.} I order, pursuant to Section 115 of the *Act*, the Determination dated July 13, 2006 is confirmed together with any further interest that has accrued under Section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal