

An appeal

- by -

Mike Nahal and Lakhvir Nahal operating Red Cedar Motel and RV Park

- 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: Robert Groves

FILE No.: 2005A/55

DATE OF DECISION: July 13, 2005

DECISION

SUBMISSIONS

Mike Nahal and Lakhvir Nahal	on behalf of Red Cedar Motel and RV Park
Ireen Chand	on behalf of herself
Hans Suhr	on behalf of the Director of the Employment Standards

OVERVIEW

1. This is an appeal by Mike Nahal and Lakhvir Nahal, operating the Red Cedar Motel and RV Park (collectively, the “Nahals”) pursuant to s.112 of the *Employment Standards Act* (the “*Act*”) against a determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) on February 28, 2005 in favour of one Ireen S. Chand (“Chand”).
2. Having made a finding in the Determination that the Nahals had contravened Sections 18, 58, and 63 of the *Act*, the Delegate ordered the Nahals to pay \$13,099.20 in respect of wages, vacation pay, compensation for length of service, and accrued interest, and three administrative penalties of \$500.00 each, for a total of \$14,599.27.
3. The Nahals appealed the Determination by means of an Appeal Form dated April 2, 2005, attaching a written submission.
4. On April 25, 2005, the Tribunal received the record which was before the Delegate, and a written submission in which the Delegate, it would seem pursuant to Section 86(2) of the *Act*, varied the Determination to provide that the total of wages, vacation pay, compensation for length of service, and accrued interest should be re-calculated at \$16,649.75 which, together with the administrative penalties of \$1,500.00, resulted in a Determination that the Nahals owed \$18,149.75.
5. By letter dated April 29, 2005, the Tribunal notified the Nahals and Chand that they would have until May 13, 2005 to make reply to the Delegate’s submission.
6. On May 13, 2005, the Tribunal received further written submissions from the Nahals.
7. By letter dated May 17, 2005, the Tribunal notified the Nahals, Chand, and the Delegate that since Chand had not been notified of the appeal due to a change of address, the time for delivery of her submission on the appeal should be extended to May 27, 2005. Further, the Tribunal advised that the Nahals would have a further two weeks to make their final reply.
8. Thereafter, the Tribunal received further written submissions from the Delegate, and Chand, dated May 20, 2005, and May 24, 2005, respectively.
9. By letter dated May 27, 2005, the Tribunal invited the parties to make any final replies by June 10, 2005. No further submissions were received from the Nahals or Chand. The Tribunal did receive a further written submission from the Delegate dated June 2, 2005, which the Tribunal forwarded to the parties

together with a letter dated June 13, 2005 containing the advice that the Tribunal had determined that the appeal would be decided on the written submissions received, and without an oral hearing.

ISSUES TO BE DECIDED

10. Having reviewed the Appeal Form and submissions filed by the Nahals I have concluded that the substance of the issues they have identified they wish determined on this appeal are as follows:
- did the Delegate fail to observe the principles of natural justice in making the Determination?
 - did the Delegate err in law?
 - has evidence become available that was not available at the time the Determination was made?

FACTS

11. The materials and submissions filed on this appeal reveal the following:
- The Nahals operate the Red Cedar Motel and RV Park in Prince George, British Columbia.
 - In or about the last week of April, 2004, Chand was hired as the resident manager of the motel and RV park, commencing May 1, 2004. The terms of her employment were never established with precision. Suffice to say, she was to make herself available on site as and when guests checked in or out, and as matters requiring her attention as manager arose in the normal course of the business of the facility.
 - The Delegate found that the duties Chand performed while employed included the registration of guests, bookkeeping, office and yard maintenance, park maintenance, answering phones, acting as receptionist, making credit card deposits and handling the daily cash requirements for the business.
 - The Delegate further determined that Chand's employment agreement included a provision that accommodation would be provided at a reasonable rate, the value of which would be deducted from her earnings.
 - Chand's relationship with the Nahals deteriorated because she was not paid for her work. Every time she asked for her wages, she was rebuffed, and the environment became hostile.
 - Early in October, 2004, Chand advised the Nahals that she was looking for other work. The Nahals asked her to stay on until they found a replacement. Chand testified at the hearing before the Delegate that her last day of work was October 23, 2004.
 - Chand filed a complaint under Section 74 of the Act, alleging that she had been discharged, and that the Nahals had contravened the Act by failing to pay wages and compensation for length of service.

- The Delegate conducted a hearing on February 8, 2005. The Nahals attended in person. Chand attended by teleconference.
- At the hearing, the Delegate had before him a list of dates and hours worked, that Chand testified she had reproduced from a black ledger book she had employed for the purposes of her job as manager, but which had been removed from her room during an absence following her last day of work.
- The Nahals did not deny that they had employed Chand. They acknowledged that they kept no records relating to Chand's employment, and more particularly, they kept no records of the hours that Chand worked. They led evidence at the hearing, essentially anecdotal in nature, concerning their occasional observations of Chand at work, and invited the Delegate to infer that Chand's records of her hours worked were grossly exaggerated.
- The Delegate concluded that the record of hours worked that Chand had submitted was accurate, principally because the Nahals had kept no records of any kind relating to Chand's employment, and also because the evidence revealed that the Nahals were at all relevant times engaged in other remunerative pursuits which precluded them from being in a position to observe the amount of work that Chand actually performed.
- In the result, the Delegate determined that Chand was entitled to wages at the minimum rate of \$8.00 per hour for the hours she testified she had worked, together with holiday pay, less the value of her accommodation and the payment for wages and a "bonus" that she had already received. In addition, the Delegate concluded that Chand had been discharged without cause, and awarded compensation for length of service.
- In his submission on the appeal, the Delegate re-calculated, and thereby augmented, the wages owing to Chand, on the basis that the deductions he had made in the Determination in respect of the value of Chand's accommodation, and the "bonus", were not supported by the relevant provisions of the Act. The Nahals did not challenge the variation of the award in any of the material delivered by them on this appeal.

DISCUSSION

Did the Delegate fail to observe the principles of natural justice in making the Determination?

12. Of the three boxes identifying grounds of appeal on their Appeal Form, the Nahals checked the box stating that the Director failed to observe the principles of natural justice in making the Determination.
13. In *Select Introductions Inc.* BC EST #D045/05, I said this:

...a challenge based on an alleged failure to observe the principles of natural justice normally gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in an appellant's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence. While the requirements of natural justice permeate the field of administrative law generally, they are also made expressly applicable to investigations conducted pursuant to the provisions of the *Act*. In this regard, the relevant provision is section 77, which stipulates that if an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

14. In my review of the materials submitted on this appeal, I discerned no evidence suggesting that the Nahals were unaware of the nature of the issues raised in Chand's complaint, or that they were in any way deprived of an opportunity to present their case in reply. On the contrary, the Nahals attended the hearing conducted by the Delegate and gave evidence. They cross-examined Chand. The Delegate's submission states that the Nahals were asked to provide any relevant records to the Delegate for consideration at the hearing, and that they were repeatedly asked if they wished to call further witnesses, but the Nahals declined to do either. A copy of the Delegate's submission was forwarded to the Nahals by the Tribunal, and the Nahals were invited to make further submissions. They did so, but nowhere in their further submission did the Nahals contradict these statements in the Delegate's submission. Moreover, there is no suggestion in the material that the Delegate considered evidence or submissions that had not been made available to the Nahals.

15. This ground of appeal fails.

Did the Delegate err in law in making the Determination?

16. Error in law is not specifically identified as a ground of appeal on the Appeal Form delivered by the Nahals. I note, however, that in their submission attached to their Appeal Form the Nahals assert that "...the director did not consider all the issues or events involved."

17. As the Tribunal has stated before, in decisions like *Triple S Transmission Inc. o/a Superior Transmissions* BC EST #D141/03, the disposition of appeals by the Tribunal is not a mechanical exercise, to be performed solely on the basis of the particular box an appellant checks off on the Appeal Form. The Tribunal must discern the real grounds for appeal and then determine if they invoke one of the statutory grounds for appeal set out in Section 112.

18. In my opinion, if the Delegate either neglected, or refused, to consider all the evidence when making his Determination, he would be guilty of having committed an error going to jurisdiction, and therefore an error of law.

19. However, I have carefully reviewed the record, and the submissions filed, and I am not persuaded that the Delegate failed to consider the evidence that was tendered, or that he was blind to the substance of the matters at hand. Chand's Complaint and Information Form clearly raised the issues of the amount of wages she felt she was owed, as well as the holiday pay and compensation for length of service she should have received upon her discharge. Of these, the issue of the number of hours Chand actually worked was by far the most significant. Much of the evidence tendered by the Nahals at the hearing, which is set out in detail in the Reasons for Determination, went directly to the issue of the number of hours Chand had worked at the motel and RV park. There is no suggestion that the Delegate ignored this evidence, took irrelevant matters into account, or otherwise misconducted himself.

20. This ground of appeal also fails.

Has evidence become available that was not available at the time the Determination was made?

21. This ground was also not checked on the Appeal Form, but in my view it is the main basis on which the Nahals seek to appeal. In their submission attached to their Appeal Form the Nahals say this:

The complainant is making up wages that are now owed to her by our company.

The complainant's history should be looked at, her personality and character should be emphasized on, witnesses should have a say.

As a company, we know that we do not owe her these wages and that she has made a false claim against us for money.

As of now we are still working with the RCMP and payment tech (bank Machine Company) due to fraud and disturbances the complainant has caused.

We have witnesses and we feel that a lawyer should be present due to the complainant's false claim.

22. In my opinion, what the Nahals are saying, in essence, is that Chand is unworthy of belief, that it was wrong for the Delegate to have accepted her evidence following the hearing at first instance, and that the Nahals should be furnished with another opportunity to attack Chand's credibility on appeal.
23. It is trite to say that proceedings before the Tribunal are not meant to constitute a complete re-examination of the complaint. There is, in general, no right to a second "kick at the can". Nor will the Tribunal readily entertain challenges to a Delegate's findings of fact. This is especially so on issues of credibility, where the Delegate who has conducted a hearing will normally have the benefit of hearing the witnesses give testimony, and the opportunity to observe their demeanour, while the Tribunal ordinarily will not.
24. Section 112(1)(c) permits the Tribunal to entertain new evidence, provided the party who wishes to rely on it demonstrates, among other things, that the evidence was not available at the time the Determination was being made.
25. In my opinion, there is nothing in the submissions delivered by the Nahals which demonstrates, and therefore convinces me, that the evidence they seek to tender was unavailable in the sense that it could not, with the exercise of due diligence, have been discovered and presented to the Delegate before the Determination was made.
26. This ground of appeal also fails.

ORDER

27. Pursuant to Section 115(1)(a), I order that the Determination issued February 28, 2005 be confirmed.

Robert Groves
Member
Employment Standards Tribunal