

An appeal

- by -

Cheryl Simmonds
(the “Appellant” or “Ms. Simmonds”)

- 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: Carol-Ann Hart

FILE No.: 2010A/105

DATE OF DECISION: October 12, 2010

DECISION

SUBMISSIONS

Cheryl Simmonds on her own behalf

Kerri Widdup on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Cheryl Simmonds (the “Appellant” or “Ms. Simmonds”) pursuant to Section 112 of the *Employment Standards Act* (“the Act”), of a Determination of the Director of Employment Standards (“the Director”) issued on June 10, 2010 (the “Determination”).
2. In the Determination, the Delegate for the Director (the “Delegate”) concluded that the *Act* had not been contravened, and there were no wages owing to Ms. Simmonds.
3. The Appellant has filed her appeal based on allegations that the Delegate failed to observe the principles of natural justice in making the Determination.

FACTS

4. According to the Determination, Ms. Cheryl Simmonds worked as a store manager for Northwest Premier Investments Inc., carrying on business as Papa Murphy’s of Canada ULC (the “Employer” or “Northwest Premier Investments Inc.”) in Penticton, B.C. Ms. Simmonds worked in this position from November 26, 2007, until approximately December 14, 2009. After that time, the business was sold to Ananda Holdings Ltd., and Ms. Simmonds has continued to work as the store manager for the new owners.
5. In the complaint filed by Ms. Simmonds with the Employment Standards Branch, she alleged that wages were outstanding with respect to the hours she worked beyond 40 hours per week, for the last six months of her employment with Northwest Premier Investments Inc.

ARGUMENT

For the Appellant

6. Ms. Simmonds maintained that she had never been given a copy of the procedures manual by the Employer. The first time she saw it was when it was provided to her by the Delegate during the investigation.
7. The Appellant noted that the procedures manual provided that managers should work 43 to 46 hours per week, and yet she was only paid for 80 hours of work in respect of each two-week period.
8. Ms. Simmonds wrote that no consideration had been given to the fact that she was short-staffed and had to work long hours, without days off or holidays, in order to keep the store open. The Employer had saved money by having her work the extra hours without having to pay anyone else. Ms. Simmonds noted that the Employer was aware of the number of hours she was working, and the fact that she was short-staffed. However, the Employer had not offered her any assistance, or considered her personal health or private life.

9. The Appellant maintained that she should be entitled to be paid for all hours worked based on the terms of her employment. She wrote that she had agreed, when she was hired, to work 40 hours each week with two days off per week, and holidays each year. Ms. Simmonds maintained that she was entitled to be paid for all of her hours in excess of 40 hours each week.
10. Ms. Simmonds wrote that she believed that she had been treated unfairly as a manager. If she had not worked all of the hours she had in excess of 40 hours per week, the employer would have had to pay another employee to work those hours.

For the Director

11. The Delegate maintained that the principles of natural justice had been observed. Ms. Simmonds had been given an opportunity to review the procedures manual during the investigation, and respond to the contents of that document.
12. The Delegate wrote that she had considered all of the Appellant's evidence and arguments in the Determination, and had concluded that the Appellant's annual salary included all hours worked. The arguments presented by the Appellant on appeal had been made and considered during the investigation.
13. The Delegate maintained that the new evidence provided on appeal did not meet the test adopted by the Tribunal for allowing new evidence. Ms. Simmonds had submitted on appeal that she was hired by Tom Lovelace and was told by him that she was only required to work 40 hour per week. The Appellant had failed to show that this information was not available at the time the Determination was made.

ANALYSIS

14. 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.
15. That provision reads:
 - 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 being made.
16. In this case, the Appellant checked the box on the Appeal Form corresponding to the allegation that the Director failed to observe the principles of natural justice in making the Determination.
17. Although on the Appeal Form Ms. Simmonds indicated that the basis for her appeal was a denial of natural justice, it is apparent that her concern was with the manner in which the Delegate had dealt with the evidence. On that basis, the grounds for appeal may be more appropriately characterized as allegations that the Director erred in law [section 112(1)(a)]; or possibly that there is "new evidence" [section 112(1)(c)].

18. As noted by the Tribunal in *Triple S Transmission Inc.* (BC EST # D141/03), although most lawyers generally understand the fundamental principles underlying the rules of natural justice and the other grounds identified under the *Act*, the grounds for an appeal “are often an opaque mystery to someone who is untrained in the law”. 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 – often without a full, or even any, understanding – simply checked off.”

19. The Tribunal member further wrote as follows:

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.

20. I agree that “a large and liberal view” should be taken, and will therefore address each of the statutory grounds of appeal in light of submissions made by the Appellant to decide the following three issues:

- 1) Did the Director fail to observe the principles of natural justice in making the Determination?
- 2) Did the Director err in law in making the Determination?
- 3) Is there new evidence which has become available that was not available at the time the Determination was made?

1. Did the Director fail to observe the principles of natural justice in making the Determination?

21. Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them, the right to present their evidence, and the right to be heard by an independent decision maker.

22. Section 77 of the *Act* requires that the Director make reasonable efforts to give a person under investigation an opportunity to respond.

23. With respect to the document referred to as the procedures manual, the Delegate indicated at page 3 of the Determination that Ms. Simmonds had been provided with that document during the investigation, and she had stated at that time that it was the first time she had seen it. The Delegate then wrote: “After reviewing the manual, she [Ms. Simmonds] agreed that she performed the duties and responsibilities outlined in the manual regarding the store manager position.” This is also reflected in the Record in an e-mail from Ms. Simmonds to the Delegate dated June 3, 2010.

24. I do not find that the Delegate failed to observe the principles of natural justice in regard to the procedures manual. Rather, the Delegate ensured that Ms. Simmonds had the opportunity to review and comment on this document. Furthermore, Ms. Simmonds did not dispute the relevant contents of the procedures manual concerning the duties and responsibilities of the store manager position.

25. The appellant did not allege that she was not afforded the opportunity to present her evidence or respond to the evidence of the Employer. She also did not claim that the Delegate was not an independent decision maker. The allegation that the Director did not act in accordance with the principles of natural justice has not been made out.

2. Did the Delegate err in law in making the Determination?

26. The Delegate considered the definition of “manager” contained in section 1 of the *Employment Standards Regulation*, and concluded that Ms. Simmonds was a “manager” during the time she was employed by Northwest Premier Investments Inc.
27. The number of hours worked by the Appellant was apparently never in dispute. What was in dispute was whether there was an agreement between the parties that the Employer would compensate Ms. Simmonds for the hours she worked beyond 40 hours per week.
28. The Delegate considered all of the evidence, and concluded that the parties had agreed that Ms. Simmonds would receive a lump sum annual salary, and she would be paid the same amount every two weeks regardless of the number of hours she had worked in order to operate the store. In the Determination, the Delegate outlined the evidence on which she had relied in reaching her conclusion.
29. The Delegate wrote in the Determination that an agreement that a manager will be paid an annual salary regardless of the number of hours worked will be upheld unless it does not meet the minimum requirements of the *Act*. She cited previous decisions of the Tribunal in which these principles were applied. The Delegate continued on to determine that the annual salary paid to Ms. Simmonds did meet the minimum wage requirements of the *Act*, and no wages were outstanding.
30. I do not find any error of law in the Determination.

3. Is there new evidence which has become available that was not available at the time the Determination was made?

31. There was new evidence provided on appeal by Ms. Simmonds. Schedules of hours worked by Ms. Simmonds and her staff members for a six month period in 2009 were submitted to the Tribunal. The appellant did not provide submissions to explain how she believed this new evidence should be considered. As set out in the Determination, the number of hours worked by Ms. Simmonds (and her staff members) was not in dispute.
32. Ms. Simmonds also wrote in her written submission that she had been told by Tom Lovelace that she was only required to work 40 hours per week. This evidence does not appear to have been brought forward during the investigation.
33. In order to succeed in an appeal on the basis that new evidence has become available, the Appellant must not only show that the new information was not considered by the Delegate. The new information the party seeks to submit must have been unavailable at the time of the investigation. The appeal is not a second opportunity to bring forward the case which should have been presented to the Delegate.
34. All of the information presented in support of the appeal was available to Ms. Simmonds at the time of the investigation. Consequently, the copies of work schedules and evidence of the Appellant about the agreement at the time of her hire do not meet the requirement of section 112(c) of the *Act* for an appeal based on new evidence. This information was available at the time of the investigation, but Ms. Simmonds did not provide it.
35. The Tribunal will not consider new evidence in the context of an appeal which could have been provided at the investigation stage (see *Kaiser Stables Ltd.*, BC EST # D058/97). The Appellant has not identified any evidence as “not available” at the time the Determination was being made, and the appeal based on the allegation of new evidence must therefore be dismissed.

36. For all of the above reasons, the appeal is dismissed.

ORDER

37. I order, pursuant to Section 115 of the *Act*, that the Determination dated June 10, 2010, is confirmed.

Carol-Ann Hart
Member
Employment Standards Tribunal