

An appeal

- by -

DDT Painting Services Ltd.
(“Appellant”)

- 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: Rajiv K. Gandhi

FILE No.: 2015A/75

DATE OF DECISION: October 29, 2015

DECISION

SUBMISSIONS

Dwayne Bondarchuk	on behalf of DDT Painting Services Ltd.
Michelle Banser	on her own behalf
Michael Thompson	on behalf of the Director of Employment Standards

OVERVIEW

1. Sections 76 and 77 of the *Employment Standards Act* (the “*Act*”) confers upon the Director of Employment Standards (the “Director”) the duty to receive, review, and where appropriate, investigate or adjudicate complaints alleging contraventions of both the *Act* and the *Employment Standards Regulation* (the “*Regulation*”).
2. Natural justice, in turn, demands that the Director exercise that duty fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at para. 2).
3. In this matter, DDT Painting Services Ltd. (the “Appellant”) challenges the May 1, 2015, determination (the “Determination”) of the Director, on the basis that a principle of natural justice, specifically the right to a fair hearing, as not observed.
4. The hearings were not fair, says the Appellant, because the Appellant’s principal, Dwayne Bondarchuk (“Mr. Bondarchuk”), did not participate, did not have an opportunity to test the evidence of each of the complainants, and did not have an opportunity to explain the Appellant’s position.
5. Mr. Bondarchuk says he did not participate in the hearings because he was otherwise dealing with a terminally ill family member.
6. Although the appeal form originally filed suggests that it seeks to change or vary the Director’s order requiring the payment of overtime wages, statutory holiday pay, annual vacation pay, interest, and penalties, I think it more accurate to say that, based on submissions now in hand, the Appellant prefers either that the Determination be cancelled or, failing that, vacated and returned to the Director for reconsideration.
7. The Tribunal has previously remarked that appeals under section 112(1)(b) of the *Act* are seldom neat and rarely tidy (see, for example, *Frenay*, BC EST # D130/04). Deciding whether or not something is fair is not an exact science, but depends, largely, on context and a consideration of what the “outsider looking in” might see.

THE FACTS AND ANALYSIS

8. In judging the merit of this appeal, I have reviewed the Determination, the appeal materials originally filed by the Appellant on June 8, 2015, and the Director’s Record (the “Record”) submitted on June 10, 2015.

9. I have also considered submissions filed:
- (a) by Michelle Banser (“Ms. Banser”), on August 26, 2015;
 - (b) on behalf of the Director, on August 25, 2015; and
 - (c) on behalf of the Appellant, on June 29, 2015, September 18, 2015, September 30, 2015, and October 8, 2015.
10. Out of these materials, I briefly summarize the following events:
- (a) Complaints under section 74 of the *Act* were filed by each of Ms. Banser and Melanae Hillton (“Ms. Hillton”) on December 2, 2014.
 - (b) Telephone adjudication of the complaints was set for March 9, 2015, and March 10, 2015, by way of notices issued on January 20, 2015. Demands for the production of employment records were issued to the Appellant on the same date, with respect to both Ms. Banser and Ms. Hillton.
 - (c) On March 5, 2015, both hearing dates were adjourned by one month, at the Appellant’s request. The reason given for the request was an illness in Mr. Bondarchuk’s family. Notice of new hearing dates was delivered firstly by electronic mail to Mr. Bondarchuk on March 5, 2015, and subsequently by regular mail.
 - (d) Each notice of hearing issued by the Director contains the following statement (emphasis not added):

The Branch Adjudicator may make a Determination based on information before them,
even if you chose not to participate at the hearing.
 - (e) The demands for employment records were answered by the Appellant in advance of the April hearing dates, although exactly when is not apparent from the Record or the other materials submitted on this appeal. With respect to each complainant, the Appellant delivered to the Director copies of pay statements, correspondence, the T4, the record of employment, and the name of a witness working in the Appellant’s administrative office.
 - (f) Neither Mr. Bondarchuk nor the Appellant’s witness appeared at the time appointed with respect to the April hearing dates.
 - (g) Contacted by telephone, on the day of but immediately before commencement of the adjudication set for April 9, 2015, Mr. Bondarchuk told a delegate of the Director that he would not attend either hearing owing to the continuing illness of his family member. The delegate advised Mr. Bondarchuk that the telephone hearing would proceed whether or not Mr. Bondarchuk attended.
 - (h) Ultimately, both hearings took place at the appointed time, in the absence of a representative for the Appellant, and the Determination ordering payment was issued on May 1, 2015.
11. I am sympathetic to the reasons given by Mr. Bondarchuk for not participating in either adjudication but, having taken a considerable amount of time to consider this appeal, I am unable to conclude that the hearings conducted on April 9, 2015, and April 10, 2015, were procedurally unfair:
- (a) The Appellant had proper notice of all hearing dates. It had ample opportunity to submit documents and evidence for consideration by the Director and, in fact, did so prior to the hearing.

- (b) By way of an adjournment application, the Appellant had opportunity to seek more time, and did so in a reasonably timely manner.
 - (c) At any time prior to April 9, 2015, and even at the commencement of the hearing of each complaint, it was open to the Appellant to make application for a further adjournment. Mr. Bondarchuk was clearly aware of the process, having done it once previously, and there is no evidence before me to suggest that he could not have done so a second time.
 - (d) When contacted by a delegate of the Director, on April 9, 2015, Mr. Bondarchuk did not ask for a further adjournment. Rather, Mr. Bondarchuk told the delegate that he did not intend to participate in the hearings for the same reason as before.
 - (e) It was also open to the Appellant to appoint another representative, or legal counsel, for the purpose of making further application for adjournment or, failing that, to present evidence at one or both adjudications.
 - (f) Having reviewed the Determination and the Record, the latter of which includes those documents submitted by the Appellant to the Director, I am satisfied that the Director considered all of the evidence before him, including materials submitted by the Appellant.
12. In an adjudication, each party is expected to provide what evidence they have, and to make submissions they consider relevant. A failure to do so can result in the issuance of a determination that does not consider all evidence, or in which the Director can draw an adverse inference from the failure to present evidence. (*Whitaker Consulting Ltd.*, BC EST # D033/06, at para. 34)
13. In this light, and considering efforts made by the Director to contact Mr. Bondarchuk and to reasonably provide the Appellant with an opportunity to participate in the hearings, I am satisfied that the Director has satisfied the onus to ensure procedural fairness outlined both by the Supreme Court of Canada and by this Tribunal (*Freny*, BC EST # D130/04, at page 7).
14. I find that the Director was entitled to continue with the April hearings notwithstanding Mr. Bondarchuk's decision not to attend. I am of the view that an "outsider looking in" would not say that Mr. Bondarchuk was denied the right to a fair hearing.
15. At the outset I adopted the reasoning of the Supreme Court of Canada when I declared that the Director must exercise his duty under sections 76 and 77 of the *Act* fairly, in good faith, and with a view to the public interest. I note, however, that the Director must do so bearing in mind section 2(d) of the *Act*, which mandates – for all parties – “fair and efficient procedures for resolving disputes over the application and interpretation” of the *Act*.
16. Having decided to adjudicate these matters, and having given the parties appropriate notice, it would be unfair to the complainants, and unrealistic on the part of the Appellant to expect otherwise, if the Director were to deviate from that process because one party, without notice to the Director or the complainants and without otherwise seeking adjournment, elects not to participate in a telephone hearing.
17. Finally, I have considered the balance of the submissions from the Appellant, Ms. Banser, and the Director relating to the findings of fact set out in the Determination, while remaining mindful that the role of the Tribunal is not to conduct a trial *de novo*. I see no basis to interfere with the Director's conclusions, and I decline to do so.

ORDER

18. For these reasons, the appeal is dismissed, and the Determination confirmed pursuant to section 115(1) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal