

An appeal

- by -

Vancity Sub Owners Ltd. carrying on business as Subway
(the “Employer”)

- 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: Yuki Matsuno

FILE No.: 2010A/111

DATE OF DECISION: November 3, 2010

DECISION

SUBMISSIONS

Narinder Nijjar	on behalf of Vancity Sub Owners Ltd. carrying on business as Subway
Elina Papule	on her own behalf
Jennifer R. Redekop	on behalf of the Director of Employment Standards

OVERVIEW AND THE DETERMINATION

1. Vancity Sub Owners Ltd. carrying on business as Subway (the “Employer”) appeals a Determination of the Director of Employment Standards issued June 17, 2010 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “Act”). The Determination was issued by a delegate of the Director of Employment Standards (the “Delegate”) after an investigation of complaints filed by Elina Papule (the “Employee”) under section 74 of the *Act* against the Employer. The Employee alleged in her complaint that the Employer failed to pay wages owing to her, including overtime, statutory holiday pay, compensation for length of service, and vacation pay.
2. In the Determination, the Delegate outlined in detail the mediation and investigation process in which both the Employer and the Employee both participated. A delegate of the Director contacted Mr. Nijjar, a Director of the Employer, to inform him of the complaint. Mr. Nijjar informed the delegate of his correct address and phone number. A mediation was scheduled and was attended by Mr. Nijjar and the Employee. Mr. Nijjar provided an earnings record and work schedules during the mediation process. As no resolution was reached during the mediation, the file was forwarded to investigation.
3. The Delegate conducted an investigation and concluded that the Employer owed the Employee a total of \$1,196.73 in wages owing for overtime, statutory holiday pay, compensation for length of service, and vacation pay. The Delegate also imposed five administrative penalties of \$500.00 each on the Employer for contraventions of section 46 (production of records) of the *Employment Standards Regulation* and the following sections of the *Act*: sections 40 (overtime wages), 45 (statutory holiday pay), 58 (vacation pay), and 63(compensation for length of service).
4. The Employer appeals the Determination on the grounds that evidence has become available that was not available at the time the Determination was being made. In addition, the Employer’s submissions also suggest that the process of making the Determination was unfair from the Employer’s perspective. Relying on *Triple S. Transmission Inc.*, BC EST # D141/03, I will adopt a large and liberal view of the Employer’s grounds of appeal and consider that the Employer also appeals on the ground that the Director failed to observe the principles of natural justice in making the Determination, even though the Employer did not check off this ground of appeal on his appeal form.
5. I am able to decide this appeal on the basis of the written materials submitted before me, namely: the Employer’s appeal form, submissions, and attachments; the Director’s submissions; the Employee’s submissions; and the Record forwarded by the Director under section 112(5).

ISSUES

6. Did the Delegate, on behalf of the Director, fail to observe the principles of natural justice in making the Determination?
7. Has evidence become available that was not available at the time the Determination was being made?

ARGUMENT AND ANALYSIS

8. The onus rests with the Employer to establish the grounds of the appeal.

Evidence Not Available at the Time of Determination

9. This ground of appeal is checked off in the Employer's appeal form. The Employer's submissions state in part: "We like [sic] to have a chance to represent our self with all the facts and figures so you can give us a decision which is accurate and just in the circumstances". Attached to the appeal form are a copy of the Demand for Employer Records dated April 16, 2010; a copy of the Employee's 2009 earnings record; and a number of work schedules. Attached to the Employer's reply submission are copies of "payroll slips for the entire period of Elina's work with the Subway company. 4% vacation pay was included in to [sic] the wages. We paid every time she worked with us." These payroll slips newly submitted by the Employer (the "Employer's Payroll Slips") indicate a separate entry for vacation pay paid; the separate entry for vacation pay is not found in the payroll slips contained in the Record, which were before the Delegate during the investigation.
10. The Delegate did not have an opportunity to comment on the Employer's Payroll Slips, as they were attached to the Employer's reply submission. However, the Delegate points out in her submission that the earnings record and the work schedules, with the exception of the schedule for the week of September 23 – 29, 2009, (the "September 23 Schedule") had been disclosed by the Employer to the Employment Standards Branch before the Determination was written, and were considered by the Delegate, as set out in the Determination. The Delegate says that the evidence fails to meet the test for consideration of new evidence set out in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03.
11. I agree with the Delegate and find that the Employer's appeal does not succeed on this ground. In order to successfully appeal a Determination on the ground that evidence has become available that was not available at the time the Determination was being made, an appellant must establish that all of the following four conditions set out in *Davies* have been met:
 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 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.
12. None of the evidence submitted by the Employer on appeal meets the test above. The evidence that had already been submitted by the Employer was clearly available to the Delegate at the time she was making the Determination. The evidence that was not before the Delegate at the time she made the Determination, i.e. the

September 23 Schedule and the Employer's Payroll Slips, fails to meet the first branch of the test in that with due diligence by the Employer the evidence could have been presented to the Director before the Determination was made. I note that the Delegate presented the Employer with numerous opportunities to submit evidence and information about the Employee's complaint. I note in particular that the Delegate wrote a letter to the Employer dated May 25, 2010, outlining the preliminary investigation findings, including the preliminary findings on the matter of vacation pay, and invited the Employer to provide written reasons and supporting evidence if the Employer disagreed with the findings. No correspondence was ever received subsequently from the Employer.

Principles of Natural Justice

13. The principles of natural justice refer to the procedural rights to which a party to a dispute is entitled, such as: the right to know the case against oneself; the right to have an opportunity to respond; the right to have the matter decided by an unbiased decision maker; and the right to be given reasons for the decision.
14. In its submissions, the Employer makes several references to the fairness of the investigation and determination process. The Employer says that the Branch did not give "enough chance to provide all the information we have on our records" and that the "decision is based on only one sided information, without considering any information we provide to them." The Employer does not provide any specific information to back up these general statements.
15. The Determination and the Delegate's submissions outline the numerous opportunities provided to the Employer to submit information and evidence to the Delegate during the investigation process before the Determination was made, including: a letter and Demand for records (sent April 16, 2010); numerous attempts to contact the Employer by telephone; and a preliminary findings letter (sent May 25, 2010, not only to the Employer's business address but also to all the Employer's directors' home addresses and the registered office/records office). It should also be noted that the Employer attended the mediation session that preceded the investigation and provided information as part of the mediation process. Clearly, the Employer had ample notice of the claim and many opportunities to respond to the complaint, as well as to provide information. I find that the Employer's arguments are without merit and that the Employer's appeal also fails on this ground.

Disposition of the Appeal

16. The appeal fails on both grounds.

ORDER

17. Pursuant to Section 115 of the *Act*, I order that the Determination dated June 17, 2010, be confirmed, along with any interest that has accrued pursuant to section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal