

An appeal

- by -

Fogg N' Suds International Ventures Corporation
(“Fogg N' Suds”)

- 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: David B. Stevenson

FILE No.: 2005A/78

DATE OF DECISION: August 2, 2005

DECISION

SUBMISSIONS

Darell Myers	on behalf of Fogg N’ Suds International Ventures Corporation
Rod Bianchini	on behalf of the Director of Employment Standards
William Chan	on his own behalf
Judith Diane Clarke	on her own behalf
Geoff Gray-Grant	on his own behalf
Deidre Jackart	on her own behalf
Todd Shelly	on his own behalf
Muthiah Thirunathan	on his own behalf
Ken Yeung	on his own behalf

OVERVIEW

1. This decision addresses an appeal filed by Fogg N’ Suds International Ventures Corporation (“Fogg N’ Suds”) under Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on April 13, 2005. That Determination found Fogg N’ Suds had contravened Part 3, Sections 17 and 21, Part 7, Section 58 and Part 8, Section 63 of the *Act* in respect of the employment of seven persons. The Director ordered Fogg N’ Suds to cease contravening those sections of the *Act*, to comply with the *Act* and the *Employment Standards Regulation* (the “*Regulation*”) and to pay wages to the seven persons named in the Determination (collectively “the Complainants”) in the amount of \$201,742.05, an amount which included annual vacation pay on the amounts owed and interest.
2. The Director also imposed administrative penalties on Fogg N’ Suds under Section 29(1) of the *Regulation* in the amount of \$2000.00.
3. Fogg N’ Suds says evidence has come available that was not available at the time the Determination was made and seeks to have the Tribunal vary the amount of the Determination. The evidence which Fogg N’ Suds seeks to introduce relates to payments made by Fogg N’ Suds to some of the Complainants in partial settlement of their wage claims, to amounts owed to some of the Complainants and to disagreements with some findings and conclusions of fact made by the Director.
4. The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

5. The issue in this appeal is whether Fogg N' Suds has shown there is any reviewable error in the Determination.

THE FACTS

6. Fogg N' Suds is the corporate head office for a business that operates several corporate restaurants and provides services to several other restaurants franchised to operate under the Fogg N' Suds name. The Complainants were employed by Fogg N' Suds in various capacities. All were terminated during a period from December 31, 2003 to February 4, 2004.
7. There was no issue that all of the seven persons were owed wages in some combination of regular wages, annual vacation pay and compensation for length of service. There was a dispute concerning the termination date of Judith Clarke ("Clarke") and, consequently, a dispute over the amount of compensation for length of service owed to her that was addressed in the Determination.
8. Clarke claimed she was terminated on February 4, 2004. Fogg N' Suds claimed her last day of work was January 14, 2004. The Director found Clarke worked for Fogg N' Suds until February 4, 2004 and used that date as the effective date of termination. The reasons for that conclusion are set out in the Determination.
9. The Determination indicates that a substantial amount of the wage claim for some Complainants were for Fogg N' Suds' business costs paid by those Complainants. Fogg N' Suds acknowledged the Complainants incurred business costs on behalf of Fogg N' Suds as part of their normal job duties, but according to the Director, "failed to respond adequately" to the claims for reimbursement of these costs. Each of the Complainants who claimed reimbursement for payment of business costs provided the Director with a detailed accounting and copies of receipts in support of their claims. The Director found there were amounts paid by those Complainants which were business costs to Fogg N' Suds, should not have been paid by those Complainants and, applying subsection 21(3) of the *Act*, were wages owed to those Complainants. The calculations made by the Director relating to these wages were provided to Fogg N' Suds.
10. In its appeal, Fogg N' Suds has indicated that some of the Complainants have received partial payment of their unpaid wages and has provided a summary of those payments. Several of the Complainants who have filed a response to the appeal confirm that Fogg N' Suds have made partial payments on their wage claims, but disagree with Fogg N' Suds on how much has been paid.

ARGUMENT AND ANALYSIS

11. Fogg N' Suds has the burden of showing their appeal falls within one of the grounds set out in subsection 112(1) of the *Act*, which 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 made.

12. Fogg N' Suds says there is evidence that has become available that was not available when the Determination was made and, based on that evidence, wants the Tribunal to vary the Determination.
13. The Tribunal has taken a relatively strict view of the "new evidence" ground of appeal, indicating in several decisions that it is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal retains a discretion to allow new evidence.
14. The additional evidence which Fogg N' Suds seeks to introduce in this appeal comprises two pages supporting the position that some adjustments should be made to the amounts owing to some of the Complainants, two pages showing the annual vacation pay record for Clarke and the Record of Employment for five of the Complainants.
15. In reply to the appeal, the Director acknowledges a miscalculation in the Determination in respect of the annual vacation pay owing to Clarke, but submits that apart from that correction the Determination should be confirmed. The Director says Fogg N' Suds has provided no new evidence.
16. With one exception, I do not accept that any of the additional evidence provided with the appeal should be accepted by the Tribunal. The exception relates to the fact that amounts have been paid to some of the Complainants as partial payment of their wage claims.
17. There is no indication the Director was aware any payments had been made to the Complainants on their claims and several of the Complainants have confirmed receiving partial payment of their wage claims in their replies to the appeal.
18. Based on that confirmation, I accept that payments have been made by Fogg N' Suds in partial satisfaction of the amounts found owing in the Determination and those payments have affected the correctness of the Determination. The circumstances justify a variance to the Determination, but the disagreement over how much has been paid on the wage claims does not allow the Tribunal to reach any final conclusion on the correct amount of the wages owing. Accordingly, the Determination will be referred back to the Director to resolve those disputes and make the necessary changes to the Determination.
19. The appeal also raises issues relating to entitlement to length of service compensation for Clarke and Geoff Gray-Grant and to some regular wages for Nathan Thurinathan. The appeal on Clarke and Mr. Thirunathan is based on a disagreement with the Director's finding of the termination date for each of these Complainants. The appeal on Mr. Gray-Grant is based on a disagreement with the finding by the Director that his employment with Fogg N' Suds had been terminated in January 2004 and he was entitled to length of service compensation. In reply to the appeal relating to Mr. Gray-Grant, the Director says Fogg N' Suds have provided no additional evidence or reason showing the Director was wrong to conclude his employment was terminated.

20. The appeal relating to the above Complainants challenges findings of fact made by the Director on available evidence. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such errors amount to an error in law. No error in law is apparent in the challenged findings of fact. While the evidence relating to the findings made on each of the above Complainants was equivocal, it cannot be said the findings were made without any evidence or that the Director acted on a view of the facts that could not reasonably be entertained. This aspect of the appeal is dismissed.
21. The appeal also speaks to setting up payment arrangements, presumably to effect an orderly payment of the wages owed without jeopardizing the ability of Fogg N' Suds to continue operating. While the Tribunal would endorse efforts to set up such arrangements, we have no authority to impose or order such arrangements.

ORDER

22. Pursuant to Section 115 of the *Act*, I order the Determination dated April 13, 2005 be referred back to the Director.

David B. Stevenson
Member
Employment Standards Tribunal