Employment Standards TRIBUNAL

An appeal

- by -

Barry Smith carrying on business as Trail Bay Print & Photo Shop
("Trail Bay")

- 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 L. Roberts

FILE No.: 2011A/77

DATE OF DECISION: November 9, 2011

DECISION

SUBMISSIONS

Barry Smith	on his own behalf, carrying on business as Trail Bay Print & Photo Shop
Narinder Gill	on her own behalf
Sukh Kaila	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Barry Smith carrying on business as Trail Bay Print and Photo Shop ("Trail Bay"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued May 5, 2011.

2. Ms. Gill worked as a manager for Trail Bay from October 10, 2009, until January 13, 2010. On January 26, 2010, Ms. Gill filed a complaint alleging that she was owed compensation for length of service.

3. A delegate of the Director held a hearing into the complaint on February 16, 2011, and on May 5, 2011, issued a determination finding Trail Bay in contravention of Section 18 of the *Act* in failing to pay Ms. Gill wages, annual vacation pay and compensation for length of service. The delegate also found Trail Bay in contravention of Section 46 of the *Employment Standards Regulation* (the "*Regulation*") in failing to produce employer records. The Director ordered Trail Bay to pay wages and accrued interest in the total amount of $2,657.37 and imposed administrative penalties in the amount of $1,000 for each the contraventions, pursuant to Section 18 of the *Act*.

4. Trail Bay contends that the Director failed to observe the principles of natural justice in making the Determination and seeks to have the Determination cancelled. Mr. Smith argued that the delegate ought to have considered email correspondence he had with Ms. Mica Nguyen, the Employment Standards Branch officer assigned to mediate the case, disputing Ms. Gill's claim. Mr. Smith also stated that, due to a computer failure, he no longer had access to those emails and sought production of those documents from the Director. Mr. Smith contended that those emails were necessary for him to be able to "make his case".

5. On July 25, 2011, I requested submissions from the Respondent and the Director on the preliminary issue of the production of the documents sought by Trail Bay. On July 25, 2011, Mr. Smith, while confirming receipt of my correspondence, provided the Tribunal with copies of "a portion of the e-mail correspondence to which I referred to in my appeal documentation." Neither the Respondent nor the Director provided submissions in response to my request. Accordingly, on September 8, 2011, having heard no objection from either party, I ordered that the Director provide copies of all emails exchanged between Mr. Smith and Ms. Nguyen by September 22, 2011. Mr. Smith was given until September 29, 2011, to provide the Tribunal with copies of the emails he wished the Tribunal to consider. The Director sent Mr. Smith copies of all his email correspondence with Ms. Nguyen by both email and registered mail on September 20, 2011. Mr. Smith did not provide the Tribunal with any emails he wished the Tribunal to consider by the deadline; accordingly, on October 17, 2011, I advised the parties that the Tribunal will proceed to consider the merits of the appeal filed on June 13, 2011.

6. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (Section 103), and Rule 17 of the Tribunal's *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). This decision is based on the Section 112(5) "record" and the written submissions of the parties.

ISSUE

7. Whether or not the Director failed to observe the principles of natural justice in making the Determination.

FACTS AND ARGUMENT

8. On December 23, 2010, the Director issued a Notice of Hearing and Demand for Employer Records. The complaint hearing was scheduled for February 16, 2011, at 9:00 a.m. The Notice contained the following information:

> The Branch Adjudicator may make a Determination based on information before them, **even if you choose not to participate or be represented at the hearing.**

9. The Notice also advised the parties that before the adjudication hearing, the parties were required to submit documentation they intended to rely on at the hearing as well as a list of all witnesses, if any. The Notice further stated that the Branch Adjudicator was able to grant adjournments of hearings in extraordinary circumstances, but adjournment applications were to be made in writing, with reasons, and provided at least one week before the scheduled date of the hearing. The record indicates that Trail Bay received this information by Registered mail on January 10, 2011.

10. On January 10, 2011, Mr. Smith emailed Ms. Nguyen, advising her that he had not received certain information from Ms. Gill and took the position that her claim was therefore "time barred" as it had not been presented within the six months provided under the *Act*.

11. On February 8, 2011, Ms. Nguyen provided Ms. Gill's submissions to Trail Bay and noted that the Branch had not received any submissions from Trail Bay. The delegate again indicated that the Branch Adjudicator would make a decision based on the best evidence available at the date of the hearing.

12. Sukh Kaila, another delegate of the Director held a hearing into Ms. Gill's complaint on February 16, 2011. No one from Trail Bay was present at the time set for the hearing. The hearing was adjourned and a delegate of the Director attempted to contact Trail Bay. A message was left regarding the hearing, but no return telephone call was received. The Director's delegate proceeded with the hearing at 9:30 a.m.

13. Mr. Smith seeks a "reconsideration" of the decision. He submits that he was unable to appear at the hearing because of vehicle problems. He says that he assumed that the mediator, Ms. Nguyen, would have provided the hearing officer with copies of the e-mails he sent her. He acknowledges that he was mistaken in this assumption because no mention of those communications is made in the Reasons for Determination. Mr. Smith asserted that the emails would demonstrate his case, which I infer is that Ms. Gill is not entitled to the wages as determined by the Director.

14. The Director submits that as mediations are conducted on a without prejudice basis, the communications between Ms. Nguyen and Mr. Smith were not considered at the time of the Determination as they did not form part of the record. The Director seeks to have the Determination confirmed.

15. Ms. Gill's submissions appear to repeat the information she provided to the Director at the hearing.

ANALYSIS

16. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law
- the director failed to observe the principles of natural justice in making the determination; or
- evidence has become available that was not available at the time the determination was being made

17. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds. I have concluded that Trail has not demonstrated a denial of natural justice.

18. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.

19. There is no dispute that Trail Bay was notified about the date and time of the hearing. Trail Bay was also notified, both in the hearing notice and in a subsequent email from the mediator, that any decision rendered at the hearing would be based on the information available to the Adjudicator at the time. I infer that Mr. Smith was under the impression that the information presented to the mediator would be automatically available to the hearing officer.

20. Although it is not clear from the record whether or not there was a formal mediation, the information provided by the Branch on its website and the Mediation 'fact sheet' states that "In order to encourage settlement, the mediation session is conducted on a "without prejudice" basis. This means that nothing that is said or proposed during mediation forms part of the record if the parties fail to agree and the matter has to proceed to adjudication". The information further indicates that "the mediator has no decision-making authority and cannot make a ruling on any of the issues", and that if the parties are unable to reach an agreement, "the issue will proceed to an adjudication or investigation with a different officer of the Employment Standards Branch".

21. I have no information as to whether or not the parties entered into a confidentiality agreement in which they acknowledged that their communications were confidential as part of the mediation. However, it is clear from Mr. Smith's submission that he was aware that Ms. Nguyen was the mediator rather than the hearing officer.

22. No one from Trail Bay appeared at the hearing and no adjournment of that hearing was sought. I am satisfied from the record as well as Mr. Smith's own admission that Trail Bay had knowledge of the time and date of the hearing and failed to appear. That does not constitute a failure on the part of the Director to comply with the principles of natural justice.

23. The Director's delegate made a Determination based on the information before him. Having reviewed the record, I find no error in the Director's conclusions.

24. Even though Mr. Smith provided the Tribunal with portions of his email correspondence to the Branch mediator, that correspondence was not available to the delegate hearing Ms. Gill's complaint given that they

were covered by mediation privilege. Although one of the statutory grounds of appeal is that evidence has become available that was not available at the time the determination was being made, these emails do not constitute "new evidence".

25. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- 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;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential 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.

26. Given that the emails were in existence at the time of the hearing and could have been provided to the hearing officer at the time and date of the hearing, they are not properly "new evidence". In any event, although they are relevant to the issue of Ms. Gill's wages, I am not persuaded that they would have led the delegate to a different conclusion on the material issue. The emails demonstrate that Mr. Smith was unable to provide employment records as required under the *Act* because Ms. Gill allegedly took them. The emails also disclose that Mr. Smith blamed Ms. Gill for incorrectly preparing payroll deductions. I am unable to conclude that review of these documents would have led the delegate to a different conclusion.

27. The appeal is dismissed.

ORDER

28. Pursuant to Section 115 of the *Act*, I order the Determination dated May 5, 2011, be confirmed in the amount of $3,657.37, together with any interest that has accrued under Section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal