Employment Standards TRIBUNAL

An appeal

- by -

Janet Christina Downey and Patrick William Downey
operating as Abode of Peace

- 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2003A/42

DATE OF DECISION: April 15, 2003

DECISION

INTRODUCTION

This is an appeal filed by Ms. Janet Downey ("Downey") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Ms. Downey appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on January 3rd, 2003 (the "Determination"). This appeal is being adjudicated based on the parties' written submissions (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

Ms. Downey's appeal is grounded on section 112(1)(c) of the *Act*--"evidence has become available that was not available at the time the determination was being made".

THE DETERMINATION

As noted in the Determination, Janet Downey and Patrick Downey (who, despite being a party liable under the Determination, is not an appellant) operated a group home for disabled adults under the name "Abode of Peace". This latter enterprise appears to have been operated as an ordinary partnership. I have before me a registration of the business name "Abode of Peace", effective as of June 17th, 1998, which identifies the only two principals of the business as Mr. Patrick Downey and Ms. Janet Downey. I shall refer to the Mr. and Ms. Downey jointly as the "Employer".

It is my understanding that the group home--which was operated from premises jointly owned by Mr. and Ms. Downey--ceased operating sometime in early December 2002.

Ms. Lisa Toye-Watson ("Toye-Watson") was employed by the Employer from September 1st, 1997 to November 13th, 2002 (when her employment was allegedly terminated without proper written notice) as a caregiver.

On December 11th, 2002, and pursuant to section 85 of the *Act*, the Director's delegate who was investigating Ms. Toye-Watson's complaint forwarded a Demand to the Employer requesting production of all relevant payroll records relating to Ms. Toye-Watson and, in addition, requested that the Employer respond, by no later than December 20th, to various aspects of Ms. Toye-Watson's unpaid wage complaint (which included overtime pay, statutory holiday pay, vacation pay and compensation for length of service). The delegate's December 11th letter was forwarded by regular prepaid post and by registered mail. Canada Post records indicate that the December 11th letter was received by Mr. Downey on December 16th, 2002.

Notwithstanding the delegate's unequivocal request for payroll records--and the further advice that Ms. Toye-Watson's complaint would be adjudicated based solely on the information made available by Ms. Toye-Watson if the Employer failed to respond--the Employer chose not to provide any of the requested information or to otherwise participate in the delegate's investigation. Accordingly, the delegate issued the Determination based on the information provided by Ms. Toye-Watson. In the end result, the Employer was ordered to pay Ms. Toye-Watson the sum of $4,622.24 on account of overtime pay ($512.64), statutory holiday pay ($63.10), vacation pay ($1,000.35) and five weeks' wages as compensation for length of service ($3,046.15).

ANALYSIS

In her Appeal Form, Ms. Downey states that "I was not able to respond due to emergency surgery and follow up recovery in the U.S." and that she wishes "this new evidence to be seen and determined". The "new evidence" relates to Ms. Toye-Watson's claim for compensation for length of service and statutory holiday pay.

In her January 31st, 2003 submission to the Tribunal (appended to her Appeal Form) Ms. Downey refers to two documents, namely, letters dated November 5th and 30th, 2002 addressed to Ms. Toye-Watson. Ms. Downey asserts that these documents show that Ms. Toye-Watson abandoned her position; Ms. Downey says that Ms. Toye-Watson's "employment was never terminated in any way". I have three observations with respect to these documents.

First, these two documents can scarcely be characterized as "evidence that was not available at the time the determination was being made". Both documents were obviously available prior to January 3rd, 2003. Second, as noted above, the delegate clearly and unequivocally requested, by letter dated December 11th, 2002, that the Employer provided all relevant documents by December 20th, 2002. These two documents could have (indeed, should have) been produced as demanded by the delegate. The delegate's December 11th letter was in the possession of the Employer by no later than December 16th, 2002 as evidenced by Canada Post's business records. Third, on their face, the documents (both of which are Ms. Downey's documents) do not constitute evidence a voluntary resignation by Ms. Toye-Watson. I might add, simply for the sake of completeness, that these documents do not, in my view, call into question the delegate's determination that Ms. Toye-Watson was dismissed without proper written notice--if anything, these documents tend to corroborate the delegate's finding on this point.

The "new evidence" submitted with respect to Ms. Toye-Watson's claim for statutory holiday pay is a 1 1/2 page document entitled "Component Services Schedule" dated *June 1st, 2001*. Quite apart from the fact that this document appears to be entirely irrelevant to Ms. Toye-Watson's statutory holiday claim, it is not, in any event, "new evidence" as defined in section 112(1)(c). This document, whatever its relevance may be, was available and could have been provided to the delegate during the investigation.

Finally, I have before me three medical notes indicating that Ms. Downey was hospitalized for surgery in mid-April 2002 (note dated September 12th, 2002); that she was not to return to work until "the end of July 2002" (note dated June 12th, 2002) and a third note, dated January 3rd, 2003, which states that Ms. Downey "has been under a great deal of stress for the past two months" which has prevented her from working although "she is doing much better and is ready to resume her work activities". Certainly, the first two medical notes could have been provided to the delegate. As for the third, although it is dated on the day the Determination was issued, I fail to see how it relates to Ms. Toye-Watson's unpaid wage complaint. Even if Ms. Downey was not medically fit to deal with the matter of Ms. Toye-Watson's complaint during the latter part of December 2002 (and other evidence before me appears to controvert that suggestion), I have no evidence before me suggesting that Mr. Downey was similarly indisposed.

In sum, there is no proper basis for disturbing the Determination under section 112(1)(c) of the *Act*. The appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of $4,622.24 together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal