

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/44

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”). In accordance with the Tribunal vice-chair’s letter to the parties dated March 24th, 2003, 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 appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “delegate”) on January 3rd, 2003 (the “Determination”). The Determination was issued following an oral hearing conducted on December 6th, 2002. Although served with formal written notice of the hearing, neither Ms. Downey nor anyone on her behalf attended the hearing before the Director’s delegate.

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 (curiously, Mr. Downey, although also liable under the Determination, is not an appellant in these proceedings) operated a group home for disabled adults under the business name “Abode of Peace”. 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. This latter enterprise appears to have been operated as an ordinary partnership. I have before me a provincial registration of the business name “Abode of Peace” (registration date: June 17th, 1998) which identifies the two principals of the business as Mr. Patrick Downey and Ms. Janet Downey. I shall refer to Mr. Downey and Ms. Downey jointly as the “Employer”.

Ms. Downey, by way of a single Appeal Form and appended supporting documents, appealed three separate determinations each of which was issued in favour of a former employee of the Abode of Peace group home (see EST File Nos. 2003A/42, 2003A/43 and 2003A/44).

The appeal in the first file (EST File No. 2003A/42) concerns a determination issued in favour of Ms. Lisa Toye-Watson. I have now dismissed this latter appeal by way of reasons that are being issued concurrently with these reasons.

The second file, being an appeal of a determination issued in favour of Ms. Jill Dyck, has now been closed in light of Ms. Downey’s March 20th, 2003 letter to the Tribunal’s vice-chair in which Ms. Downey stated that “In regards to Jill Dyck, I would like to drop my appeal as I agree with...[the] determination.”

The Determination before me in this appeal (EST File No. 2003A/44) addressed a complaint that was filed by Ms. Panagiota Thymaras (“Thymaras”). Ms. Thymaras, who was employed by the Employer as a caregiver from October 2001 to November 28th, 2002, filed a complaint seeking overtime wages and compensation for length of service.

An oral hearing regarding Ms. Thymaras' complaint was scheduled for December 6th, 2002 at 1:30 P.M. at the Victoria office of the Employment Standards Branch. The hearing notice--headed "Notice of Complaint Hearing"--was delivered by registered mail to the Employer. The hearing notice was mailed on November 21st, 2002 and Canada Post records indicate that Mr. Downey accepted personal delivery on November 30th, 2002.

The one-page Notice of Complaint Hearing states that "The Director of Employment Standards has appointed a Branch Adjudicator to conduct a hearing" with respect to an unpaid wage complaint filed by Ms. Thymaras. Further, the following statement appears at the bottom of the page:

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.**

(**boldface** type in original)

Notwithstanding the foregoing cautionary note, neither Ms. Downey, Mr. Downey or anyone on their behalf, attended the December 6th hearing before the delegate. I might add that several other documents were attached to the hearing notice including directions regarding how to apply for an adjournment of the hearing. So far as I am aware, the Employer never applied for an adjournment of the hearing.

In the absence of any evidence from the Employer, the delegate issued the Determination based on the evidence provided by Ms. Thymaras. In the end result, the Employer was ordered to pay Ms. Thymaras the sum of \$1,681.39 on account of overtime pay (\$739.80), vacation pay (\$64.67) and two weeks' wages as compensation for length of service (\$876.92).

ANALYSIS

Ms. Downey appeals the Determination on the basis that she has new and relevant evidence to present. 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". This latter statement is more in keeping with an assertion that she was denied natural justice (a failure to be heard) but, in light of the circumstances relating to the hearing, I cannot conclude that the rules of natural justice were breached in this case [section 112(1)(b)].

With respect to Ms. Thymaras, Ms. Downey has not filed *any* new evidence. In her written submission dated January 31st, 2003 (appended to her Appeal Form), Ms. Downey simply makes certain uncorroborated assertions with respect to Ms. Thymaras' unpaid overtime wage claim. With respect to the matter of compensation for length of service, Ms. Downey says only that "The Ministry of Social Service informed me of the program closure exactly two weeks prior to the December 6 closing". While this latter circumstance undoubtedly affected the ability of the Employer to maintain operations, the fact remains that there is no evidence before me--nor was there any before the delegate--that Ms. Thymaras received any prior written notice of termination. Contained in the material before me is a one-page handwritten memorandum "To all Staff" dated November 21st, 2002 which purports to represent notice of termination but there is no evidence that this memorandum was ever given to Ms. Thymaras (whose employment, I might add, ended on November 28th, 2002 in any event). Further, Ms. Downey does not assert that written notice of termination was ever, in fact, given to Ms. Thymaras--Ms. Downey merely asserts that the November 21st memorandum was "posted".

Certainly, neither Ms. Downey's assertions about Ms. Thymaras' overtime claim nor the November 21st memorandum constitutes "evidence...that was not available at the time the determination was being made" since this information could have readily been provided to the delegate at the December 6th hearing had the Employer chosen to attend.

Ms. Downey also submitted three medical notes which indicate 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 note, although it is dated the same day the Determination was issued, I fail to see how it relates to Ms. Thymaras' unpaid wage complaint. Even if Ms. Downey was not medically fit to deal with the matter of Ms. Thymaras' complaint during the latter part of December 2002 (and other evidence before me--for example, the November 21st memorandum which is in Ms. Downey's handwriting--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 \$1,681.39 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