

An appeal

- by -

Elaine Rodgers

- 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/150

DATE OF DECISION: November 24, 2011

DECISION

SUBMISSIONS

Elaine Rodgers	on her own behalf
Sonja Strauss aka Sonja Coetzee	on her own behalf, carrying on business as Out-Site-In Design
John Dafoe	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Elaine Rodgers, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued August 24, 2011.
2. Ms. Rodgers worked as a sales associate for Sonja Strauss a.k.a. Sonja Coetzee carrying on business as Out-Site-In Design (“Sonja Coetzee”) from October 8, 2010, until February 24, 2011. On March 21, 2011, Ms. Rodgers filed a complaint with the Director alleging that Ms. Coetzee had contravened the *Act* in failing to pay her commission wages and incorrect compensation for length of service.
3. Following a hearing on June 13, 2011, a delegate of the Director issued a Determination finding that Ms. Coetzee had contravened Section 63 of the *Act* in failing to pay Ms. Rodgers compensation for length of service. The Director found that Ms. Rodgers was not entitled to commission wages. The Director ordered Ms. Coetzee to pay compensation and accrued interest in the amount of \$331.31. The Director also imposed an administrative penalty in the amount of \$500 for the contravention, pursuant to Section 18 of the *Act*.
4. Ms. Rodgers contends that the Director failed to observe the principles of natural justice in making the Determination and seeks to have the Determination varied.
5. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 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 written submissions of the parties and the section 112(5) “record”.

ISSUE

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

FACTS

7. Ms. Rodgers testified that the compensation for length of service paid by Ms. Coetzee was less than she was entitled to. After considering Ms. Rodgers’ total wages for the last 8 normal weeks of work, the delegate concluded that Ms. Coetzee owed Ms. Rodgers \$685.46. The delegate calculated this amount based on Ms. Rodgers’ wages for the last 8 normal weeks of work. From this, the delegate deducted \$386.42 already paid by the employer, for a total amount owing of \$326.42. This amount was not disputed by Ms. Coetzee.

8. Ms. Rodgers also claimed she was entitled to an additional \$471.60 in commission earnings. Ms. Coetzee contended that no commissions were owed as there were no commissions on discount sales. Ms. Rodgers acknowledged that the question of commissions being paid on discounted sales items was discussed between the parties but that no final decision had been made. Ms. Coetzee also testified that Mr. Rodgers was not involved in one of the specific commission sales identified as being owed by Ms. Rodgers and that the other sale was not concluded until after Ms. Rodgers' employment had ended.
9. The delegate concluded that it was unlikely that Ms. Coetzee, "operating a business facing financial difficulties and forced to deeply discount the price of all inventory, would have simply raised the question of commissions on discounted items while making no decision on whether they were payable." The delegate concluded, on a balance of probabilities, that no commission was payable on discounted items. The delegate further found no clear evidence that Ms. Rodgers was "the effective cause of any of the sales in question" and concluded that Ms. Rodgers was not owed any outstanding commission wages.
10. Ms. Rodgers appears to repeat many of the arguments she advanced before the delegate. She contends that she was involved in a number of sales and suggests that I "ask to see the sales receipts for January". Ms. Rodgers suggests that the delegate's findings reflect a "biased opinion" and submits that the employer's financial situation should not have had any bearing on her entitlement to commission wages.
11. The Director submits that the financial position of the business was relevant as Ms. Coetzee testified that it was one of the reasons she told Ms. Rodgers commissions would no longer be payable on clearance items. The delegate submitted that it was this January conversation that formed his findings of fact. The delegate further submits that Ms. Rodgers provided no clear evidence to establish she was the cause of sales for which she claimed commissions. The delegate further notes that the document submitted by Ms. Rodgers on appeal was not submitted at the hearing, although it was clearly available at the time.
12. In reply, Ms. Rodgers says that the conversation about the commissions occurred in December, not January, and submits that I should refer to "the audio tape" that she made at the hearing. She asserts that she was not told she would not receive any more commissions on discounted items. Ms. Rodgers submits that she received commissions for each month she worked at the store, including January, when the items were discounted. Ms. Rodgers also submits that she "was sure" she had forwarded the email to the delegate in her original submission.

ANALYSIS

13. 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;
 - evidence has become available that was not available at the time the determination was made.
14. 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.
15. Although Ms. Rodgers alleges a failure to comply with principles of natural justice as the ground of appeal, the written submissions are, in essence, an attempt to re-argue the case presented to the Director. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. 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. Natural justice does not mean that the delegate accepts one party's notion of "fairness".

16. I am satisfied that Ms. Rodgers had full opportunity to present her case to the Director and respond to her employer's evidence. I find no merit to this ground of appeal.
17. In *JC Creations* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" to the appeal document: "The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned."
18. Ms. Rodgers disputes the Director's factual findings and conclusions.
19. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained. However, an appeal is not an opportunity to re-argue a case.
20. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.
21. I am not persuaded that Ms. Rodgers has demonstrated that the delegate made a palpable or overriding error. In my view, the delegate's conclusions were reasonable, based on the evidence before him.
22. The copy of the email submitted by Ms. Rodgers on September 30 and again on November 14, 2011, does not meet the Tribunal's test for new evidence as it was clearly available at the time the Determination was being made and has not been considered.
23. The appeal is dismissed.

ORDER

24. Pursuant to Section 115 of the *Act*, I order the Determination dated August 24, 2011, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal