

An appeal

- by -

Talia Hammond
("Hammond")

- 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/115

DATE OF DECISION: September 8, 2005

DECISION

SUBMISSIONS

Talia Hammond	on her own behalf
Jeet Bhatti	on behalf of Versatile Storage
Alan Phillips	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Talia Hammond (“Hammond”) of a Determination that was issued on May 31, 2005 by a delegate of the Director of Employment Standards (the “Director”).
2. Hammond had filed a complaint with the Director claiming she was owed regular wages, overtime wages, annual vacation pay and statutory holiday pay by Jaswinder Bhatti and Jeet Bhatti operating Versatile Storage (“Versatile Storage”). Later in the process, Hammond raised a claim for length of service compensation, as she was not terminated at the time her complaint was initially filed with the Director.
3. Following a hearing on March 23, 2005, the Director issued the Determination, which found Versatile Storage had not contravened the *Act* and that no further action would be taken on Hammond’s claim.
4. Hammond says the Director failed to observe principles of natural justice in making the Determination and that new evidence has come available that was not available at the time the Determination was being made. She seeks to have the Tribunal vary the Determination.
5. Hammond has not requested an oral hearing on the appeal. In response to the question whether she believes an oral hearing on the appeal is necessary, she has written, “I don’t know I have never dealt in this situation before.” The Tribunal has carefully reviewed the appeal and the materials on file and has concluded that an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issue is whether Hammond has shown the Director committed a reviewable error in making the Determination.

THE FACTS

7. The Determination indicates a complaint hearing was held by teleconference on March 23, 2005 and sets out the following background information:

Jaswinder Bhatti and Jeet Bhatti operating Versatile Storage operates a self-storage business in Kamloops, BC which falls under the jurisdiction of the Act. Talia Hammond was employed as the on-site manager of the facility from August 1, 2004 to February 10, 2005 at a rate of pay that is in dispute.

8. Hammond contended that her wage rate was \$2000.00 a month (net), while Versatile Storage said that her wage rate was \$2000.00 a month (gross). The Director made a finding that Hammond's wage rate was \$2000.00 a month (gross). Based substantially on that finding, Hammond's claim for an additional amount of regular wages was denied.
9. Hammond and her husband occupied an apartment on the site of the storage facility. The record indicates a value for the rent of the apartment was treated as a taxable benefit to Hammond but that amount was not, of course, included in Hammond's wages for the purpose of considering her claim under the *Act*.
10. The Director noted the parties agreed that the office hours for the storage facility were 9:00 am to 5:00 pm, but also concluded that since the apartment was Hammond's residence she was on call at that location for a good part of the time the office was open and was not performing "work" as that term is defined in the *Act*.
11. The Director found Hammond had been paid all annual vacation pay owing, had been paid for all statutory holidays and had not shown she was owed any additional statutory holiday pay by virtue of having worked on a statutory holiday.
12. The Director found no credible evidence that Hammond worked overtime on either a daily or weekly basis. One of the factual issues relating to the question of overtime was whether Hammond had worked overtime hours doing work outside of the set office hours, including shovelling snow in the compound. Versatile Storage said Hammond had done no snow ploughing. In her appeal, Hammond says she told a delegate, who she identified as "Karen", during the complaint process that she had photos of her shovelling snow but that delegate refused them.
13. The Director denied the claim for length of service compensation because Versatile Storage had provided Hammond with the required written notice of termination.
14. During the complaint process, both parties provided the Director with evidence supporting their respective positions. There was a conflict in some of the evidence, and the Director provided reasons in the Determination for not accepting some of the evidence. Included in the information provided by Versatile Storage were copies of Hammond's pay statements for each month, commencing August 2, 2004 and ending January 31, 2005, and what appears to be a reconciliation of amounts paid to and owed by Hammond dated February 12, 2005.

ARGUMENT AND ANALYSIS

15. Hammond has the burden of persuading the Tribunal there is a reviewable error in the Determination. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

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.*

16. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the complaint process, hoping the Tribunal will reach a different conclusion. An appeal is an error correction process with the burden of showing the error being on the appellant. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such finding amounts to an error of law.
17. In this appeal, Hammond says the Director failed to observe principles of natural justice in making the Determination and that evidence has become available that was not available when the Determination was made.
18. I shall first address the ground of appeal relating to new, or additional, evidence becoming available. The Tribunal has taken a relatively strict view of this ground of appeal. While the Tribunal retains a discretion to allow new or additional evidence on an appeal, we do not normally allow such evidence where that evidence could have been acquired and provided to the Director before the Determination was issued. In addition to considering whether the evidence was reasonably available and could have been provided during the complaint process, the Tribunal also considers whether the evidence is relevant to a material issue arising from the complaint and whether it is credible, in the sense that it has to be reasonably capable of belief.
19. With one notable exception, the appeal does not present any new or additional evidence which is potentially relevant at all to Hammond's claim, but primarily re-states assertions of fact that were presented to the Director during the complaint process or presents commentary on matters that have no relevance to the merits of her claim.
20. The one exception is found in a short paragraph of the appeal submission in which Hammond says she was asked, "from day 1", to keep a record of her hours and to give them to Jas Bhatti. Her submission goes on to imply that she did so and that Jas refused to give the records back when Hammond asked for them. Neither the Record nor the Determination make any reference to such a record having been kept by Hammond and provided to her employer. The only record of hours included or referred to in the material is a hand written record provided by Hammond during the complaint process, which in the Determination the Director says "appears to have been constructed in one sitting" and was found to be lacking in detail, contradictory and generally unreliable.
21. In the response to the appeal, Versatile Storage denies any such record was ever provided by Hammond.
22. As an acceptable ground of appeal, this additional evidence suffers from several defects: first, it is evidence that was available and could have been given to the Director during the complaint process; second, in the absence of the actual record referred to, such evidence says nothing about the hours Hammond claims she worked; third, the assertion that such a record exists (which is disputed) is not directly relevant to the merits of Hammond's claim, which can only be decided after examining the record she says was provided and finding it to be generally accurate; fourth, the accuracy of the record itself (if it exists) can still be disputed; and finally, the assertion that Hammond ever kept such a record of hours worked generally lacks credibility. Quite apart from the denial by Versatile Storage that such a record was provided to them by Hammond, common sense suggests that the existence of such a record would have been viewed by Hammond as important to her claim and identified by her to the Director during the complaint process. This view is reinforced by Hammond's comment in the appeal that she "asked for a copy back" from Jas Bhatti, but that request was refused.
23. I do not accept the additional evidence provided and, consequently, this ground of appeal is dismissed.

24. My analysis of the appeal reveals only two matters that could remotely be described as raising an issue of natural justice.
25. First, Hammond says she had some photos of the snow she ploughed by hand but was not allowed to use them. The appeal is not very specific on this point. It is unclear in what circumstances she was “not allowed” to use the photographs. There is reference in the appeal to “Karen” refusing the photographs, but nothing to identify who “Karen” was, her relationship to the complaint or the basis and circumstances of “Karen” refusing the photographs. There is also some reference in the appeal to “surveillance [sic] tapes”, which “Keirin” denied, but I do not view this assertion any differently than I do the assertion relating to the photographs. There is a suggestion in the reply of the Director that “Karen” was a delegate of the Director initially assigned to receive and review Hammond’s complaint.
26. The Determination refers to Hammond stating during the complaint hearing that there were “pictures (photographs) to prove this work (snow shovelling) was necessary”, but it also indicates no photographs were submitted by her in support of her claim. There is no indication in the Determination that Hammond was denied an opportunity to submit her photographs. In the reply to the appeal, the Director submits Hammond may (emphasis included) have been told she could not submit the photographs and the tapes by a delegate when the complaint was first received at the Branch in January 2005 but was told by the same delegate in a conversation on March 9th that she should submit any evidence she wished to rely on and was told during a telephone conference on March 18th to provide any evidence supporting her claim that she wished to rely on at the complaint hearing. In response to that direction, Hammond submitted several pieces of evidence, but did not submit any photographs or surveillance tapes.
27. Second, Hammond submits the Director received written statements prior to the complaint hearing that were not prepared by the individuals who signed them and which were proven to be “manufactured and all false”. The appeal does not indicate in what respects these statements were “false”, as opposed to being disputed by Hammond. Nor does the appeal indicate in what respects (if any) the written statements provided differed from the oral evidence given by each witness at the complaint hearing or created some unfairness in Hammond’s ability to present her claim. In reply to this submission, the Director says Hammond is correct that the written statements were not written by the individuals. The witness statements were intended to be in the nature of “will-say” statements and in making the Determination the Director placed emphasis on the oral evidence given by the individuals at the complaint hearing.
28. Neither of these matters demonstrates the Director failed to comply with principles of natural justice in making the Determination. As the Tribunal has noted in several decisions, principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. Hammond was given a full opportunity to present her claim and to challenge the position taken by Versatile Storage.
29. The onus of proving a failure to comply with principles of natural justice is on Hammond.
30. On the first matter, Hammond is at least required to provide evidence accurately setting out what was said to her by “Karen” about accepting the photographs and the surveillance tapes, who she understood “Karen” to be and the circumstances in which the statement was made, including those circumstances which would justify a conclusion that she reasonably relied upon that statement and was misled about whether the Director would allow the photographs and the surveillance tapes to be used - see *James Hubert D’Hondt operating as D’Hondt Farms*, BC EST #RD021/05 (Reconsideration of BC EST

#D144/04). That evidence has not been provided. In its absence, and particularly in light of the two discussions in which she was invited to submit any evidence in support of her claim, I am unable to find she was denied the right to present her case by the conduct or representations of the Director.

31. The second matter does not show any denial of natural justice at all. While I question the authority of the Director to require parties to a complaint hearing to provide “will-say” or written statements of the evidence of potential witnesses, there is some merit in the Director seeking to make the complaint process more efficient and, to that extent, requesting the parties to summarize the evidence that might be given by any potential witness. Such summaries serve two primary purposes relating to the efficiency of the complaint process: it allows the Director to consider the potential relevance of the proposed evidence of any potential witness; and it gives the parties notice of that evidence, avoids surprise (and minimizes the possibility of adjournment) and allows a party the opportunity to prepare a response to the evidence. Neither of those purposes are inconsistent with principles of natural justice. In fact, one might effectively argue that requesting pre-hearing summaries of evidence be provided promotes procedural fairness by ensuring the parties are aware of the case to be met.
32. The Record includes the written statements of four witnesses for Versatile Storage. The written statement of Janet Quigley could not be located by the Director and was not included in the Record. The written statements provided do not differ materially from the summary of the evidence that each of these persons gave orally at the complaint hearing and which is set out in the Determination. On that basis, I have some difficulty appreciating how the written statements affected Hammond’s opportunity to have her complaint fairly determined. I acknowledge that if a written statement were significantly at odds with the corresponding oral evidence there would be a real concern about the credibility and weight to be given the oral evidence, but there is no indication or evidence that concern arises in this case.
33. The appeal does no more than challenge aspects of the evidence provided by the witnesses, some of which was accepted by the Director in making findings of fact. For the reasons stated in the appeal submission, which includes the point that the written statements were “manufactured”, Hammond in effect says the Director should not have accepted the evidence of the witnesses presented by Versatile Storage. As I have indicated above, unless there is an error in law (and none has been shown) the Tribunal has no authority to accept or consider an appeal which is based on alleged errors in findings of fact.
34. This ground of appeal is also dismissed.

ORDER

35. Pursuant to Section 115 of the *Act*, the Determination dated May 31, 2005 is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal