

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

D.M. Stewart's Cartage Ltd

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 98/069

DATE OF DECISION: April 16, 1998

DECISION

OVERVIEW

This is an appeal by D.M. Stewart's Cartage Ltd ("Stewarts") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination (File No. 041-783) identified as CDET No. 007364 and dated January 14, 1998 by the Director of Employment Standards (the "Director").

The Director's Delegate found that Stewarts are liable to pay an employee, Larry Cronin ("Cronin"), compensation for length of service and vacation pay arising from the termination of Cronin's employment.

Stewarts has appealed on the grounds that the Delegate failed to investigate and decide on the issue of whether the employee was offered and had refused reasonable alternative employment by the employer pursuant to the exception contained in section 65(1)(f) of the *Act*.

Stewarts also appeals that the wage calculations were not accurate.

ISSUE TO BE DECIDED

The issues to be decided in this case are whether the Director's Delegate duly considered the exceptions to the provisions for compensation for length of service and whether the wages were accurately calculated.

FACTS

The Determination sets out the Employer's position that Cronin was fired because of complaints received from customers about his attitude but does not refer to any facts surrounding any offer of alternative employment. The Delegate submitted, on the Appeal, that Cronin was offered some other employment and submits that the job offered was significantly different. The Delegate submitted, on the Appeal, a letter from Cronin dated December 15, 1997 apparently in response to a submission by the Employer. The Delegate did not include a copy of the employer's submission to which Cronin's letter was responding.

Cronin's letter of December 15, 1997 does confirm that he was offered alternative employment.

ANALYSIS

It is clear from reading the letter of December 15, 1997 and the Delegate's submission on this Appeal that the question of reasonable alternative employment was a "live issue" during the investigation. The Determination however does not address this exception to the provisions of

Section 63 of the *Act*. It is incumbent on the Delegate to demonstrate that such issues have been considered and to set out the factual basis and rational for rejecting the employer's position. It can not simply be ignored and then disputed if and when an appeal is filed.

This Tribunal has held in a number of decisions that the Tribunal will not consider new evidence that could have been tendered by the employer at the investigation stage (see for example *Kaiser Stables Ltd* [1997] BC EST #D058/97; *Tri-West Tractor Ltd* BC EST #D268/96). This principle should also apply to the Director. It is not appropriate to raise for the first time on appeal an argument against the employer's position that should have been properly investigated and analyzed in the Determination.

The Tribunal is an appeal body and it is not appropriate for this Tribunal to be an investigative body of first instance. The issues raised in this Appeal were known to the Delegate at the time of the investigation and raise important issues of fact that need to be established to ensure fair treatment of both employee and employer.

ORDER

I order, under Section 115 of the *Act*, that this matter be referred back to the Director for a full investigation and analysis surrounding the issues of "just cause" and "reasonable alternative employment" to provide sufficient factual information upon which a Determination can be properly made and, if necessary, appealed.

John Orr
Adjudicator
Employment Standards Tribunal