

An appeal

- by -

John Douglas Edwards  
(“Edwards”)

- 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:** David B. Stevenson

**FILE No.:** 2003A/56

**DATE OF DECISION:** May 6, 2003

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by John D. Edwards (“Edwards”) of a Determination of the Director of Employment Standards (the “Director”) dated January 29, 2003. Some background is essential to an appreciation of this appeal.

### BACKGROUND

On November 8, 2001, the Director received a complaint from Edwards. He alleged that his former employer had hired him to train as Assistant Manager at a pub in Osoyoos, the Burrowing Owl, and had made representations about the job that were false. He also complained that the Burrowing Owl had improperly required him to pay a till shortage. The Director processed the complaint and proceeded to investigate the complaint as an allegation of a contravention of Sections 8 and 21 the *Act* by an entity identified in the correspondence as 488718 B.C. Ltd. operating as Burrowing Owl Pub and Beer & Wine Store. A Determination was issued on the complaint on February 11, 2002, in which the Director found that 488718 B.C. Ltd. operating as Burrowing Owl Pub and Beer & Wine Store had not contravened the *Act*, ceased investigating the complaint and closed the file.

Edwards appealed that Determination and on June 20, 2002, the Tribunal held an oral hearing on the appeal. Edwards appeared on his own behalf. No one appeared for 488718 B.C. Ltd. operating as Burrowing Owl Pub and Beer & Wine Store. Edwards gave evidence under oath at the hearing. The appeal was allowed. A decision was issued by the Tribunal on July 15, 2002, BC EST #D307/02. In the reasons for decision, the Adjudicator made the following comments and finding:

Based on the sworn evidence of the [sic] Mr. Edwards who gave credible sworn evidence, we find that the employer did contravene Section 8 in that Mr. Edwards was induced, influenced and persuaded to become an employee by the following promises which did not materialize:

- a) Edwards was to be the assistant manager
- b) Edwards was to be given at least 90 hours of work every pay period

Sometime between the date of decision and October 25, 2002, the Director became aware, and the Tribunal was notified, that 488718 B.C. Ltd. operating as Burrowing Owl Pub and Beer & Wine Store was not the correct employer. Edwards had in fact been employed by 631825 B.C. Ltd. operating as Burrowing Owl (the “Burrowing Owl”). As a result, the February 11, 2002 Determination and the Tribunal decision BC EST #D307/02 were canceled.

In November, 2002, the Director notified the Burrowing Owl of Edwards’ complaint. The complaint was re-investigated. During the investigation, Edwards’ complaint under Section 21 of the *Act* was settled. On January 29, 2003, the Director issued the Determination under appeal. The Determination noted the absence of any clear evidence as to what position was offered to Edwards and found, on a balance of probabilities, that no misrepresentation had been made.

In this appeal, Edwards says that finding is wrong. He says the Director failed to observe principles of natural justice.

The Tribunal has decided that an oral hearing is not required in this matter. The appeal can be addressed through written submissions.

## **ISSUE**

The issue in this appeal is whether Edwards has shown the Director erred in finding that the Burrowing Owl had not misrepresented the availability and type of work and the conditions of employment.

## **FACTS**

The Burrowing Owl is a pub/restaurant in Osoyoos. Edwards worked for the Burrowing Owl from October 2, 2001 to October 25, 2001 as a bartender at a rate of \$9.00 an hour.

Edwards alleged he had discussed the availability of an Assistant Manager position at the Burrowing Owl with Dinora Tilson (“Tilson”), who was General Manager of the Burrowing Owl at the time. He said he was interviewed by Tilson, was hired as Assistant Manager and was to be trained to replace Tilson when she left the Burrowing Owl to assume the duties of General Manager at a new pub/convention centre in Osoyoos. He claimed that on the basis of his being hired to the Assistant Manager position, and on the promise of at least 90 hours of work every pay period, he left his job and incurred expenses to move to Osoyoos.

Tilson was interviewed by the Director. Tilson acknowledged interviewing Edwards. The Burrowing Owl had recently run an ad for bartenders, servers and cooks. She said there was no mention during the interview of an Assistant Manager position being available. Edwards was hired as a bartender. The Determination notes that Tilson was “emphatic that she at no time discussed with or promised an Assistant Manager job to Edwards”.

The decision of the Director was based primarily on the inability of Edwards to provide any convincing evidence that Tilson had misrepresented the availability of an Assistant Manager position and that Edwards would be hired as Assistant Manager (Trainee). The following statement is found in the Determination:

Only Tilson and Edwards were present at the meeting and both parties differ greatly as to what was discussed, offered and agreed to. Edwards, since he makes the claim, has a responsibility to provide some evidence other than his word to prove his contention and I can find none.. His resume clearly indicates no recent experience in the bartending/pub industry. The last position he held that was even somewhat close to the duties at the Burrowing Owl was 1984-1987 at the Tofino Legion.

The hospitality industry in Osoyoos is largely seasonal, May through September. With the lack of evidence provided by Edwards and his lack of recent experience it does not seem reasonable that the Burrowing Owl would hire him as an Assistant Manager, promise him 45 hours per week and carry him through their slowest season.

## ARGUMENT AND ANALYSIS

The burden is on Edwards to persuade the Tribunal that the Determination is wrong in some way that would justify the intervention of the Tribunal under Section 115 of the *Act*. (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not a re-investigation of the complaint nor is it simply an opportunity to re-argue positions taken during the investigation. No new information has been provided to the Tribunal in this appeal.

Edwards says there was a failure by the Director to observe principles of natural justice. It is apparent, however, that Edwards' concern in this appeal is with the Director's handling of his evidence. On that basis, the appeal is more accurately characterized as an assertion that the Director erred in law (see *Triple S Transmission Inc. o/a Superior Transmissions*, BC EST #D141/03).

In his appeal submission, Edwards re-iterates that he was hired on the promise he would be the assistant manager and would be given at least 90 hours in every pay period. He gave credible testimony to that effect in a hearing before the Tribunal.

In reply to the appeal, the Director says the Determination was based on the evidence. The reply from the Burrowing Owl is similar to the Director's, and says the Determination was "totally supported by the evidence" that the Director was able to ascertain or uncover. Both of those statements are valid only if Edwards' evidence was found to be not credible and was rejected, in whole or in part, on the central evidentiary issues. It is apparent that Edwards' evidence of what was promised to him by Tilson - evidence that Edwards had also provided to the Tribunal under oath - was rejected by the Director without explanation.

The Director has considerable latitude in deciding to accept or reject evidence, in whole or in part. However, in doing so the Director must act judicially, and not arbitrarily or unreasonably, in weighing and assessing the credibility of the evidence. More specifically, the Director may not reject evidence on an important point without good reason, which must include a finding against the credibility of the evidence and an explanation why the evidence was found to lack credibility. Not only has the Director not provided any such explanation, but in light of the finding by the Tribunal that Edwards' evidence under oath on those issues was "credible" - a finding I will not ignore - the reason for rejecting Edwards' "word" may need to be particularly compelling.

The Director's failure to provide a valid reason for rejecting Edwards' evidence is an error of law that justifies the Tribunal's intervention under Section 115 of the *Act*.

The appeal succeeds.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated January 29, 2003 be cancelled and the matter referred back to the Director.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**