

**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 -

Linda Palmer and Don Palmer, Directors of Linco Development  
(the "Palmers")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Mark Thompson

**FILE No.:** 2000/001 and 2000/002

**DATE OF DECISION:** April 18, 2000

## DECISION

### OVERVIEW

Linda Palmer and Don Palmer (the “Palmers”) appealed two Determinations issued by a delegate of the Director of Employment Standards (the “Director”) on December 10, 1999 pursuant to Section 112 of the *Employment Standards Act* (the “Act”). The Determinations found that the Palmers owed Diana Van Tunen (“Van Tunen”), \$2,797.57 for compensation for length of service, vacation pay and interest pursuant to a contract of employment. The Determinations in question ordered the Palmers to pay the amount owing to Van Tunen as directors of Linco Developments Ltd. (the “Employer”), pursuant to Section 79(3) of the *Act*.

The Palmers filed identical appeals. They argued that Van Tunen had received proper notice of her termination and that the delegate had calculated her length of service incorrectly. Furthermore, they stated that the purchaser of their business had offered Van Tunen continued employment.

The Director’s delegate argued that a corporate determination had been issued against Linco Developments Ltd. on November 22, 1999 for the amount in question. That determination had not been appealed. Shortly before the expiry date for an appeal the first determination, the delegate issued the two Determinations under appeal to ensure that the amounts owed to Van Tunen under the corporate determination would be collected. The evidence and arguments presented by the Palmers in support of their appeal of the December 10, 1999 Determinations were not available to the delegate when he issued the corporate determination. Consequently, the appeal should be denied.

This decision was based on written submissions from the parties.

### ISSUE TO BE DECIDED

The issues to be decided in this case are: whether the Employer should be allowed to introduce evidence in support of its appeal that it did not produce for the Director’s delegate during his investigation of Van Tunen’s complaint, and the relationship between the corporate determination and the December 10, 1999 Determination.

### FACTS

Van Tunen was employed by the Employer at a restaurant in Smithers, B. C. Her compensation was \$9.00 per hour, plus a monthly salary of \$250. She was terminated on January 22, 1999 when the restaurant ceased operation. The parties agree that Van Tunen received at least two weeks’ notice of termination. After her termination, Van Tunen filed a complaint claiming that she was entitled to an additional 6 weeks’ pay in lieu of notice. Van Tunen stated that she had been employed by Linco Developments Ltd. from June 1990 until the date of her termination. She acknowledged that she took pregnancy leave and parental leave from February 13, 1995

through September 13, 1995, but denied that she had resigned her job. During the course of the investigation of her complaint, the Employer stated that Van Tunen had resigned her job in 1995 and had been rehired some time later. The Employer did not provide any records to support its claim. The delegate found that the Palmers were the only two officers and directors of the Employer.

Based on the evidence available, the delegate concluded that Van Tunen's length of service was from 1990 through the date of her termination on January 22, 1999. Consequently, she was entitled to an additional 6 weeks' pay in lieu of notice of termination under Section 63 of the *Act*. The delegate issued a determination to that effect on November 22, 1999, ordering the Employer to pay Van Tunen 6 weeks compensation for length of service, plus vacation pay and interest, for a total of \$2,797.57. The November 22, 1999 determination was not appealed.

The Director's delegate stated that he was concerned that the Employer might not be able to pay the amount of the November 22, 1999 determination and issued the two Determinations under appeal in this case on December 10, 1999. He took further steps to freeze the Employer's bank accounts to ensure that payment was made to Van Tunen after the deadline for an appeal of the November 22, 1999 determination.

The Palmers filed their appeals on January 4, 2000, the final date for appealing the December 10, 1999 Determinations. In their appeals, the Palmers first argued that they had posted a written notice to all staff on November 9, 1998, stating that the restaurant would close at the end of January 1999. According to the Palmers, the notice further stated that the Employer would rehire its employees when it opened a restaurant at a new location. The Palmers stated that they did offer Van Tunen employment at a lower rate of pay in June 1999, but Van Tunen declined the offer. Although the Palmers did not provide a copy of the notice in support of their appeal, they did present statements from two employees stating that the notice had been posted before the end of November 1998.

The second grounds for the Palmers' appeal was that Van Tunen had been laid off due to lack of work on February 10, 1995 and was rehired on September 13, 1995. The appeal provided a copy of the Record of Employment dated September 15, 1999 indicating that Van Tunen had been terminated because of a lack of work.

Van Tunen denied that any written notice had been posted before January 11, 1999. In fact, she stated that she had turned down an offer of employment at another restaurant in December 1998 because the Employer had assured her that her job would continue. Van Tunen also took vacation over Christmas 1998 based on that assurance. Van Tunen admitted that she had improperly completed the Record of Employment in 1995. However, she did have a baby during the period in question and returned to the same position she had previously held after the completion of her maternity and parental leaves.

The corporate determination of November 22, 1999 was not appealed. No evidence was presented that the Palmers were not directors and officers of the Employer.

**ANALYSIS**

The Director's delegate argued that this appeal should fail first because the original determination was never appealed. The Palmers stated that they were informed that they did not have to appeal the original determination. The Palmers have presented no evidence that addresses the Determinations in question, i.e., that they were not directors and officers of Linco Developments Ltd., the Employer named in the November 22, 1999 determination.

In support of their appeal, the Palmers provided a statement about the period of notice given to Van Tunen prior to her termination. None of that information was given to the Director's delegate during his investigation of Van Tunen's complaint. The Tribunal is an appeal body, not an agency to conduct or supervise investigations of complaints. It normally does not accept evidence proffered for the first time in support of an appeal. In addition, the Employer never did provide direct evidence that it had "given written notice of termination as required by Section 63 of the *Act* in November 1998. Although Van Tunen's Record of Employment did support the Employer's position about her length of service, it was not produced until after the appeal period for the corporate determination had expired.

Under the appeal system of the *Act*, the appellant bears the onus of proving that the determination in question contained errors of law or fact. In this case, the Palmers did not show that the Determinations under appeal were deficient on either ground. Moreover, they failed to provide sufficient evidence to overturn the corporate determination had it been open to appeal. The record is clear that no appeal of the corporate determination was ever filed in any case.

**ORDER**

For these reasons, the Determinations of December 10, 1999 are confirmed. The Palmers are obligated to pay Van Tunen \$2797.57, plus any additional interest due under Section 88 of the *Act* from the date of the Determination.

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**Mark Thompson**  
**Adjudicator**  
**Employment Standards Tribunal**