

An appeal

- by -

637520 B.C. Ltd. operating as Mac's Convenience Store - # 2669

- 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 Ann Hart

**FILE No.:** 2005A/149

**DATE OF DECISION:** October 17, 2005

## DECISION

### OVERVIEW

1. This Decision deals with a referral back arising from an appeal by 637520 BC Ltd., operating as Mac's Convenience Store, of a Determination dated December 15, 2004 issued by a delegate of the Director of Employment Standards (the "Director"), pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113 (as amended)* (the "Act").
2. The decision in this matter, follows the order made on file BC EST #D095/05, in which Member John Savage referred part of the matter back to the Director. On July 6, 2005, Mr. Savage issued a Decision (and on July 14, 2005, a Corrigendum) in which he allowed the appeal, in part. Although most of the Determination of the Director was upheld, the Member ordered as follows: "The Determination of the Director that there was statutory holiday pay owing and finding a breach of section 46, and imposing a \$500.00 penalty, is set aside." That matter was referred back to the Director pursuant to s. 115(1)(b) of the *Act*.
3. Mr. Savage found that the issue of statutory holiday pay for April 9, 2004 was not in the record which was before the delegate for the Director. He wrote as follows: "In my opinion it would be a breach of natural justice to impose liability on a person where the person is not given an opportunity to respond to an issue because there has been no notice of the specific complaint."
4. The Director's response to the referral-back was filed with the Tribunal on August 20, 2005, and the parties have not made any further written submissions.
5. I have now been designated to make a decision in this matter. The Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

### ISSUE

6. As a result of this referral-back, should the Determination in question be confirmed, varied or cancelled?

### FACTS

7. The background facts were set out in the previous Decision and will not be repeated here.

### THE REFERRAL BACK REPORT

8. The delegate for the Director wrote in his referral back report dated August 20, 2005 that he had given both parties an opportunity to be heard on the issue which had been referred back to him. The parties were asked for written submissions and evidence in response to three specific questions posed by the delegate for the Director concerning the matter of the statutory holiday pay for April 9, 2004, and the penalty.

9. A written reply from Mr. Aden was received by the delegate for the Director, together with a copy of his time sheet for the month of April 2004, which showed that Mr. Aden had worked from 2:00 p.m. to 10:00 p.m. on April 9, 2004. No written submission was received from the employer. The delegate found that Mr. Aden had worked on Good Friday, April 9, 2004, and was not paid statutory holiday pay for working on that day as required under section 46 of the *Act*.
10. The delegate for the Director submitted that the delegate's original finding on the matter of the statutory holiday pay for April 9, 2004, and the administrative penalty which was imposed should be upheld.

## **ANALYSIS**

11. The burden rests, in this case with the parties, to demonstrate an error in the referral back report.
12. After the Tribunal received the delegate for the Director's referral back report, the Vice-Chair of the Tribunal wrote to the parties requesting submissions, and all documents and records supporting the parties' positions.
13. No submissions were received by the Tribunal in response to the referral back report of the delegate for the Director. I have therefore assumed that the parties do not take issue with the delegate's conclusions.
14. Having reviewed the decision of the delegate for the Director on the referral back, there is nothing before me that would cause me to find that the conclusions reached by the delegate are in error. I confirm the findings.
15. Accordingly I accept that Mr. Aden is owed the amount of \$73.26, as calculated by the delegate for the Director in his report dated December 15, 2004. The Determination will be confirmed in that amount. The administrative penalty of \$500.00 imposed pursuant to section 29 of the *Act* for the contravention of section 46 of the *Act* is also upheld.

## **ORDER**

16. Pursuant to section 115 of the *Act*, and further to Tribunal Decision BC EST #D095/05, I order that the Determination be confirmed as issued together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since December 15, 2004.

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**Carol Ann Hart**  
**Member**  
**Employment Standards Tribunal**