

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 -

Henry Wang
("Wang")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/843

DATE OF HEARING: March 26, 1998

DATE OF DECISION: April 23, 1998

DECISION

APPEARANCES

for the appellant:	Louise Richards Henry Wang
for Orchid Mandarin Restaurant Ltd.	Peter Au

OVERVIEW

This is an application under Section 112 of the *Employment Standards Act* (the “*Act*”) by Henry Wang (“Wang”) from a Determination of a delegate of the Director of Employment Standards (the “Director”) dated October 27, 1997. In that Determination, the Director stopped the investigation of a complaint filed by Wang, citing the discretion of the Director under Section 76(2) of the *Act*. Wang challenges that decision.

ISSUE TO BE DECIDED

The issue is whether the Director, exercising her discretion under Section 76(2) of the *Act*, erred in stopping the investigation of the complaint filed by Wang.

FACTS

The relevant facts necessary to decide this appeal are succinctly stated as follows in the Determination:

Based on the payroll records, work schedules and interviews, there has been no evidence produced that would establish you worked the hours that you could remember, or that you worked beyond August 15, 1998.

Those factual conclusions are supported by documents and other materials in the file.

ANALYSIS

The *Act* mandates the Director to administer and enforce minimum standards of employment in workplaces of employees covered by the *Act*. She, and those she delegates to assist her in meeting her mandate, are deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate. In the context of a complaint filed under Section 74 of the *Act*, the Director is required by subsection 76(1) of the *Act* to investigate. However, the *Act* also allows the Director the discretion to refuse to

investigate or to stop or postpone an investigation in certain circumstances. Those circumstances are set out in subsection 76(2). For reference, Section 76 of the *Act* states:

76. (1) *Subject to subsection (2), the director must investigate a complaint made under section 74.*
- (2) *The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if*
- (a) *the complaint is not made within the time limit in section 74 (3) or (4),*
 - (b) *this Act does not apply to the complaint,*
 - (c) *the complaint is frivolous, vexatious or trivial or is not made in good faith,*
 - (d) *there is not enough evidence to prove the complaint,*
 - (e) *a proceeding relating to the subject matter of the complaint has been commenced before a court, tribunal, arbitrator or mediator,*
 - (f) *a court, tribunal or arbitrator has made a decision or award relating to the subject matter of the complaint, or*
 - (g) *the dispute that has caused the complaint is resolved.*
- (3) *Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.*

The decision made by the Director to refuse to investigate or stop or postpone investigating the complaint was an exercise of the discretion granted to the Director in paragraph 76(2)(d). The Tribunal has recently addressed the extent to which, and under what circumstances, an exercise of discretion by the Director will be subject to review on appeal under the *Act*. In *Re Jody L. Goudreau and Barbara E. Desmarais, employees of Peace Arch Community Medical Clinic Ltd.*, BC EST #D066/98, the Tribunal stated:

The Tribunal will not interfere with that exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

. . . a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”.

Associated Provincial Picture Houses v. Wednesbury Corp. [1948] 1 K.B. 223 at 229

Absent any of these considerations, the Director even has the right to be wrong.

The burden to show that the exercise of discretion was flawed in one or more of the four ways described above is on Wang.

I conclude he has not met that burden. There is no issue raised in this appeal that the exercise of discretion constituted an abuse of power. The Director clearly had the authority under the *Act* to refuse to investigate or stop or postpone investigating the complaint. There was no indication of any procedural irregularity present in this case, notwithstanding Wang’s complaint that he was not allowed to sit in on the delegate’s interviews with other employees. There is nothing in the *Act* requiring a delegate to allow a complainant to participate in the investigation of their complaint. Wang was given an opportunity to respond to the information provided by the employees during interviews. He also had ample opportunity to provide any information supporting his claim. There is no procedural irregularity in the investigation made by the delegate.

Finally, it is apparent that appropriate consideration was given to both the material supplied by the employer and the statements of Wang. It is also apparent the conclusion of the delegate, that there was no evidence supporting the claim, was eminently reasonable. In the appeal hearing, Wang simply reiterated the unsupported claims he had made during the investigation. There was no indication that relevant matters were not considered or that irrelevant matters were considered. There is no basis for disturbing the judgement of the Director in this case.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 27, 1997 be confirmed.

.....
David Stevenson
Adjudicator
Employment Standards Tribunal