

An appeal

- by -

Scanditours Canada Inc. operating as Scandinavian Travel Centre  
("Scanditours" or "Employer")

- 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:** Paul E. Love

**FILE No.:** 2003A/82

**DATE OF DECISION:** June 3, 2003

## DECISION

### OVERVIEW

This is an appeal by an employer, Scanditours Canada Inc. (“Scanditours” or “Employer”), from a Determination dated January 23, 2003 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”). The Delegate determined that the sum of \$1,765.35 was owing to Paivi Blackburn (the “Employee”), for unpaid wages, statutory holidays, vacation pay, compensation for length of service and interest. The Delegate issued the Determination on the basis of information provided only by the Employee during the investigation. The Employer was afforded a reasonable opportunity to participate in the investigation of the Employee’s claim. The Employer advanced no reason for its failure to adduce information at an earlier stage. The Employer refused or neglected to participate in the investigation.

The Employer appealed on the basis of “new evidence” not available at the time of the issuance of the Determination. The Employer argued “bias”, but did not adduce any particulars or evidence of bias. The Employer sought to argue “just cause” to avoid compensation for length of service, sought to have entitlements determined on the basis of a 7.5 hour day, rather than an 8 hour day, and sought to offset a ticket cancellation penalty from wages (a possible civil claim against the Employee). The Tribunal will not permit an appellant, to raise on an appeal, issues or information which should have been raised during the course of an investigation, where the Employer has neglected or refused to participate in the Determination: *Tri-West Tractor, BCEST #D268/96*. It is not an error for the Delegate to determine the Employee’s entitlement based on information presented only by an Employee, where an Employer has refused or neglected to participate in an investigation. Further, the Tribunal has no jurisdiction to “offset” civil claims made by an Employer against wages determined to be owing by the Delegate.

### ISSUE:

Did the Employer establish bias in the investigation or a right to adduce “new evidence” in the appeal?

Did the Employer have the right to off-set a ticket cancellation charge against wages owing to the Employee?

### FACTS

I decided this case after considering the notice of appeal filed by the Employer, the written submissions of the Employer, and Employee and the Delegate. The Delegate conducted an investigation of this matter and issued the Determination and written reasons on January 23, 2003.

Ms. Blackburn worked for the Employer between April 23, to August 21, 2002 in its travel agency business. The Employer carried on its business in British Columbia, and in Ontario. The Employee ceased her employment with the British Columbia business, because the Employer did not pay her wages on a timely basis, and for the pay period from August 16 to 21, 2002. The Employer failed to respond to the self-help kit which was sent by the Employee to the Employer. During the course of the investigation, the Delegate sent two letters to the Employer, and sent a letter to Timo Jokinen, a director of the Employer. The Delegate also sent a registered letter to the Employer’s lawyer, which was returned, and

marked “refused”. As a result of not receiving any response from the Employer, the Delegate issued the Determination. The Determination was issued solely on the basis of information presented to the Delegate by the Employee. On February 19, 2003, the Employer responded to the Delegate’s December 19, 2002 letter, after the Determination was issued. The Employer made a number of allegations, a summary of which is set out under the Employer’s Argument section of this Decision.

The Delegate found that Ms. Blackburn was entitled to the sum of \$1765.35 which was calculated as follows:

Unpaid wages: August 16 - 21, 2002	\$480.00
Statutory Holidays	\$360.00
Vacation Pay April 23 - August 21, 2002	\$269.12
Compensation for length of service 40 hrs x \$15.00/hr plus 4 %	\$624.00
Interest from August 23, 2002 to Date of Determination	\$32.33
Total	\$1,765.35

### **Employer’s Argument:**

The Employer appealed on the basis of evidence that has become available which was not available at the time the Determination was made. The Employer says that the Determination was biased, and did not “reflect what happened”. The Employer says that Ms. Blackburn quit her employment. After Ms. Blackburn quit her employment, the Employer says it discovered a ticket which Ms. Blackburn issued to her boyfriend, which was not paid for, in the amount of \$1900. The Employer cancelled the ticket, and incurred a cancellation penalty of \$400.00. The Employer says that all documentation related to the ticket issuance was destroyed by the Employee. The Employer seeks to offset this amount. The Employer admits to not paying the Employee wages. The Employer also seeks to have calculations based on a 7.5 hour day instead of a 8 hour day. The Employer says that the amount owing is \$539.12. The Employer says that it would have terminated the Employee because of a substance abuse problem and for “after discovered fraud”, and therefore the Employee is not entitled to compensation for length of service. The Employer says that the company has ceased business, and the Employee can be paid from funds to be received from the Employer’s tax return.

### **Employee’s Argument:**

The Employee noted that she left her employment because she was not getting her pay cheques. She says that she issued a ticket, which was subsequently cancelled by the Employer, which resulted in a cancellation penalty to the Employer of \$400.00. She says that she did this to secure her pay. The Employee denies any substance abuse problem.

### **Delegate’s Argument:**

The Delegate says that nothing in the evidence before the Delegate supported the Employer’s assertion that the hours per day was 7.5 hours per day. The Delegate submits that the Employer’s appeal is out of time. The Delegate further submits that a claim in relation to a cancelled airline ticket is a civil matter,

and no offset is permitted by the *Act*. The Delegate further submits that the Employer failed to participate in the investigation.

## ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employer, to demonstrate an error such that I should vary or cancel the Determination.

Section 112 (1)(c) of the *Act* provides for an appeal on grounds that:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was made.

### **Bias:**

The Employer alleges bias. Bias, if established, falls within the section 112(b) of the *Act* and is contained within section 112(1)(b) of the *Act*, in the “failure to observe the principles of natural justice.” The Employer has provided no particulars or evidentiary foundation for a bias submission. I dismiss the Employer’s allegation of bias as being an allegation made without foundation.

### **New Evidence:**

The Employer appeals on the basis that “evidence has become available that was not available at the time the determination was made”. It now seeks to argue that it had cause to dismiss Ms. Blackburn, and it disputes the basis of the calculations. The Employer has not advanced any reason for its failure to participate in the investigation. In my view the failure to address this issue is fatal to any claim that new evidence is now available. This is a case where the Employer refused or neglected to participate in the investigation rather than a case of “new evidence”. There was an evidentiary basis before the Delegate for the findings set out in the Determination that the Employee was entitled to unpaid wages, vacation pay, statutory holiday pay, compensation for length of service and interest. There was an evidentiary basis for the Delegate to calculate the Employee’s entitlement based on an 8 hour day. Under section 77 of the *Act*, the Delegate is required to make a reasonable effort to give a person under investigation an opportunity to respond. I find that a reasonable opportunity was given by the Delegate to the Employer. It is not an error for the Delegate to proceed on the basis of information received from the Employer, where an Employer has refused or neglected to participate in an investigation. The Tribunal has said on many occasions that an Employer cannot lie in the weeds, fail to participate in an investigation and seek to adduce evidence on appeal which should have been presented to the Delegate during the course of the investigation. I dismiss this appeal on the basis of the principles set out in *Tri-West Tractor, BCEST #D268/96*.

**Offset of Cancellation Payment:**

Before leaving this case I note that the Employer seeks to offset funds which it claims were taken fraudulently by the Employee. I note that the Employee denies the fraud alleged. It is unnecessary for me to make any findings concerning the Employer's allegation. The Employer may have a civil claim against the Employee, but I need not decide that, and I am without jurisdiction to make such a finding. I agree with the submission of the Delegate that the cancellation payment or ticket cost, cannot fall within any permitted deduction that the Employer may make from wages pursuant to section 21 and 22 of the *Act*. The Tribunal is a statutory body and not a court. The Tribunal has a jurisdiction which is limited by the *Act*. That jurisdiction relates, in essence, to wage claims, and other statutory entitlements, made by the employee against an employer arising out of an employment relationship. The Tribunal has no jurisdiction to deal with a "set off" of civil claims, such as the claim made by the Employer. If the Employer intends to pursue this claim, it must do so in the proper forum.

**ORDER**

Pursuant to s. 115 of the *Act* the Determination dated January 23, 2003 is confirmed, together with interest in accordance with section 88 of the *Act*.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**