Employment Standards TRIBUNAL

An appeal

- by -

Fleming Financial Corp.
("Fleming" 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/86

DATE OF DECISION: June 3, 2003

DECISION

OVERVIEW

This is an appeal by an employer, Fleming Financial Corp.("Fleming" or "Employer"), from a Determination dated February 26, 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 $20,663.42 was owing to Shelley MacFarlane (the "Employee"), for unpaid wages, vacation pay, compensation for length or service and interest. The Delegate issued the Determination on the basis of information provided only by the Employee during the investigation. The Employer was not afforded a reasonable opportunity to participate in the investigation of the Employee's claim. The Employer filed documents which demonstrated an error in the Determinations of at least $2,972.50, based on cancelled cheques and bank statements. The filing of these documents resulted in a disclosure from the Employee, contained in the Delegate's submission, that a further sum of $2000 was received by the Employee. The Employer filed documents and claimed that the sum of $4,128.99 and not $20,663.42 was due to the Employee.

While there was some entitlement of the Employee to wages, the amount of wages owing was not apparent from the information before me. The positions of the parties on the issue of payments received was vastly different. The Delegate failed to provide the record to the Tribunal, as mandated by section 112(5) of the *Act*. The Delegate also indicated in a written submission to the Tribunal that "it was difficult for the Delegate to determine exactly what the complainant's wage entitlement was". The Delegate further noted that the Employer's documents submitted on appeal "did not clarify some of the issues". Given the failure of the Delegate to provide the record, it was impossible for the Tribunal to reconcile the positions and evidence, in order to fix the amount of wages owing by the Employer to the Employee. This Tribunal is not satisfied that the Determination accurately determines the Employer's liability to the Employee for wages. Given the documents filed by the Employer, there may be credibility issues to address in an investigation or hearing conducted by the Delegate. This was a proper case to cancel the Determination.

ISSUE:

Did the Employer establish the Delegate erred in the Determination?

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 February 26, 2003.

The Delegate says that numerous phone calls were made to the Employer, and that correspondence sent to the Fleming home address was not responded to. The details of the attempts to make contact are not set out in the Determination, or Delegate's submissions. There is no evidence before me that the Employer was put on notice that the case may be decided on the basis of Employee evidence only. There is no evidence in this case of any "registered letters" being sent to the Employer. There is no evidence of any demand for employer records sent to the Employer. The Determination was issued solely on information

provided by the Employee. The Delegate failed to provide the record as required by section 112(5) of the *Act*.

The Delegate found that Ms. MacFarlane was employed by Fleming for the period January 22, 2001 to April 4, 2002. Ms. MacFarlane alleged that she had not been paid a salary between August 15, 2001 until April 4, 2002. The Delegate found that Ms. MacFarlane was receiving a salary of $30,000, and that she was not paid for the period August 15, 2001 to April 4, 2002. The Delegate found that Ms. MacFarlane was laid off on April 4, 2002. The Delegate further found that Ms. MacFarlane had not been paid vacation pay, and was entitled to compensation for length of service. Ms. MacFarlane informed the Delegate that she had received advances in the total amount of $1,500 on August 20, 2002 and December 23, 2002. The Delegate found that Ms. MacFarlane was entitled to the sum of $20,663.42, as follows:

$2500 per month x 7.5 months	$18,750.00
Vacation pay (4%) on $37,500	$1,500.00
Compensation for length of service (2 weeks)	$1,250.00
Total	$21,500.00
Less advance payments	$1,500.00
Total	$20,000.00
Interest as per section 88	$663.42
Total outstanding	$20,663.42

Employer's Argument:

The Employer appealed on the basis that "we were not given proper notification to respond." The Employer wishes to "change the Determination", as it alleges the amount calculated is incorrect. The Employer says that the principal of the company had been working out of town for the past six months, and was not aware of any message from the Delegate, and that a deadline of January 2, 2002 was overlooked. The Employer alleged a number of errors in the Determination, which it says reduces the amount payable to the Employee to $4,128.99. The Employer provided a document with a breakdown of dates and amounts in the total amount of $9,2400. The Employer provided a document which is said to be an acknowledgment by Ms. MacFarlane of receipt of $6,615.00. The Employer provided another document (item #6) which sets out amounts paid. The Employer says that the Determination incorrectly calculates the amount owing for wages. The Employer submitted documents including bank statements, cancelled cheques, a breakdown of amounts of payments, an email acknowledgment of a payment, a copy of record of cash payments made, and a demand for payment to Canada Customs and Revenue Agency (item 7). The Employer submitted that the Employee took vacation, and that should be taken into account.

Employee's Argument:

The Employee argued that the Determination should be maintained in the amount of $20,663.42. The Employee submitted that the Employer put things off to the last minute, rather than dealing with matters in a timely way. The Employee submits that she has never had a vacation. The Employee alleged that she had problems clearing and cashing cheques received from the Employer, and was assured by the

Employer that she would be paid once his "deal was up and running", and that she would receive a bonus. The Employee submits that she has suffered financial hardship arising from the failure of the Employer to pay her wages. The Employee submits that she is owed money for expenses and interest on the expenses.

Delegate's Argument:

The Delegate submits that the Employer had an adequate opportunity to respond to the complaint, and that the Delegate made numerous phone calls and sent correspondence to the "home address". The Delegate says that the correspondence was not replied to. The Delegate submits that it was difficult to determine Ms. MacFarlane's entitlement in the absence of records. The Delegate submits that the response of the Employer does not clarify the issues. The Delegate appears to have canvassed the Employer's appeal submission with the Employee. The Delegate indicates that the Employee did receive the three cancelled cheques, in the amount of $2,972.50, provided by the Employer. The Delegate further says that the Employee received $2,000 in payments in August and December. The Delegate suggests that the Determination by varied to $18,663.42.

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.

I am satisfied that the Delegate received the appeal form provided by the Employer. The record that was before the Delegate was not provided by the Delegate to the Tribunal. I note that the Director has a statutory duty set out in 112(5) to provide the Tribunal with the record:

On receiving a copy of the request under subsection (2)(b) or amended request under subsection (4)(b), the director must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director.

The appeal made by the Employer is based on an inadequate opportunity to present evidence, and would fall under s. 112(1)(b) of the *Act*. A failure to provide an adequate opportunity to a party under investigation is a "failure to observe the principles of natural justice". Section 77 of the *Act* provides that a party under investigation must be given an opportunity to respond. I note that in *Evans (c.o.b. Evans Trucking), BCEST #D384/98*, the Tribunal held that the Delegate failed to make a reasonable attempt to permit the employer to respond, where the Delegate issued a Determination, on the basis of employee information only, after "unreturned" telephone calls to the Employer.

Unfortunately, this is a case where the Delegate issued a Determination without obtaining the Employer's side of the story. The Delegate did not make contact with the Employer, although the Delegate initiated and attempted to contact the Employer by telephone and by a letter. There is no evidence of a registered letter sent from the Delegate and refused by the Employer. I note that the Director is empowered to demand documents. There is no evidence before me of the Delegate having demanded documents from the Employer. I take adjudicative notice that Delegates generally do keep records of contact attempts, and particularly correspondence to parties. This information has not been provided to me. As a result of the Delegate's failure to provide the record, I am unable to prefer the Delegate's submission that she extended an adequate opportunity to the Employer to participate in the investigation, in preference to the appellant's submission that it was not given such an opportunity. I am not satisfied that a proper opportunity was given to the Employer to participate in the investigation.

I am concerned that once the Employer did respond, with a submission to the Tribunal, the Employer demonstrated an error in the Determination. I am concerned that the information apparently provided by the Employee to the Delegate is not the "entire story" of payments received from the Employer. The Delegate has commented on the Employee's confusion as a result of the Employer's cheques "not clearing". This may be the case, however, the written complaint is not before me, nor is the evidence that was before the Delegate. If the Employee was confused, the "confusion" of the Employee has apparently contributed to an error in the Determination of almost $5,000. It appears from the cancelled cheques and bank statements provided by the Employer, that Ms. McFarlane received a sum of $2,972.50, for the followings amounts on the following dates:

August 15, 2001	$964.34	cheque # 1088
August 31, 2001	$964.34	cheque # 1116
September 15, 2001	$1143.82	cheque # 1114

Further, it appears that following the filing of the form of appeal, the Employee disclosed to the Delegate receipt of a further $2,000, which apparently was not disclosed to the Delegate during the course of the investigation. The submission of the Delegate dated April 3, 2002 states:

> However, MacFarlane has advised the Delegate, that in light of the information provided by Fleming, she had checked with her bank and it appears that she did receive 3 of the cheques that Fleming had referred to. According to MacFarlane many of Fleming's cheques had been returned NSF and it was difficult for MacFarlane to know which cheques actually cleared the bank. According to MacFarlane she had deposited a $500.00 cheque in August and another $500.00 cheque in December of 2002, and a $1000.00 cheque on July 22 that were not returned NSF. MacFarlane has advised the Delegate that she would be willing to deduct these amounts from the Determination. The Determination could then be varied to $18,663.42

The Employee's submission to the Tribunal, dated March 25, 2003, however, is that:

> I stand firm in my claim in which Labour Relations asked for in the amount of $20,663.42.

Further, from a reading of the Delegate's submission, it appears that the Delegate had some difficulty in the investigation in determining "exactly what the complainant's wage entitlement was". The Delegate submitted that the documents submitted by the Employer did not clarify some of the issues. There has not

been any apparent attempt, in the Delegate's submission, to reconcile the different information provided by each party on the issue of payments made.

I note that when a Delegate investigates a complaint, the burden must rest with the Employee to demonstrate that there are wages owing. Even in a case where an Employer has been accorded an opportunity to participate in an investigation, and refuses or declines the opportunity, there must still be cogent evidence to support a finding of a wage entitlement. The Employer has a statutory duty with regard to record keeping, and the Delegate has a power to demand documents. These investigative tools are available to the Delegate in order to determine an employee's wage entitlement, if any.

I am satisfied that the Employer has shown an error in the Determination. I am concerned that the wage entitlement claimed by the Employee is substantial, and that the Delegate did not have the benefit of the Employer's version of the facts prior to issuing the Determination. I am further concerned that given error has been proven, I do not have the record. There appears to be at least an error of $2,972.50 in the Determination. Disclosure of the appeal form to the Employee apparently resulted in a further examination of records by the Employee, and an admission by the Employee, which caused the Delegate to suggest a $2,000 reduction in the amount of the Determination. The Delegate's submission is based only on the Employee's admissions, and not on the basis of the written documents adduced by the Employer. The information before me suggests that the Determination should be reduced by at least $4,972.50.

It is impossible for me in reviewing the Determination, the Delegate's submission and the Employee's submission for me to understand the Employee's evidence on advances. The amounts the Employee admits receiving (as set out in the Determination and the Delegate's submission) are not supported by the actual banking records submitted by the Employer. There is no rationale in the Delegate's submission why I should accept statements of the Employee over the banking records of the Employer. I cannot be satisfied that the Delegate's findings were reasonable, or that cogent evidence supported the finding of the Employee's entitlement set out in the Determination.

The Employer has shown some error in the Determination. Given my disposition of this case, it is unnecessary for me to determine the full extent of Delegate error. The Employer alleges further payments, which reduce the amount payable to the Employee to $4,128.99. Some of the payments appear, at face value, to be supported by documents filed by the Employer on appeal (items 4, 5, 6, 7). These further payments are denied by the Employee. The assertion of payment, and the denial of receipt, raises a credibility issue between these parties. I make no comment on those further claims, as I do not have all the evidence that was before the Delegate. This case may become the subject of further investigation, or oral hearing, by the Delegate, following the cancellation of this Determination.

It is apparent that some money is owing to the Employee. I cannot tell the amount owing from the information before me. There is a sizeable difference between that amount admitted to be owing by the Employer, the amount alleged to be owing by the Employee, and the amount determined by the Delegate in the investigation. It is not possible, on the evidence before me, to reconcile the different information and positions of the parties. I am particularly concerned, that the record was not sent to the Tribunal by the Delegate as mandated by section 112(5) of the *Act*. With the record, I could perhaps, have sorted out the amount owing by the Employer to the Employee.

In my view, this is a proper case to cancel the Determination, for the reasons noted above.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated February 26, 2003 is cancelled.

Paul E. Love
Adjudicator
Employment Standards Tribunal