Employment Standards TRIBUNAL

An appeal

- by -

Lawra Viskovic
("Viskovic" or "Employee")

- 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/118

DATE OF DECISION: June 6, 2003

DECISION

OVERVIEW

This is an appeal by an employee, Lawra Viskovic ("Viskovic" or "Employee"), from a Determination dated March 17, 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 conducted an oral hearing, which was attended by a director of the Employer, Facade Couture Inc. but not by Ms. Viskovic. The Delegate determined no wages were owing to Ms. Viskovic, on the basis of the Employer's evidence. The Employee alleges an error of natural justice in the Delegate proceeding with the hearing and making a decision based on the Employer's evidence. On the Employee's version of events presented to the Tribunal, she was hired by the Employer to work for $15.00 per hour, with a monthly minimum of 20 hours per month. The Employee alleges that she quit after learning that she was not guaranteed 20 hours per month. She was paid for the time worked by the Employer at minimum wage. The Delegate determined the case on the basis of the Employer's evidence at the hearing. The Employer alleges that Ms. Viskovic was hired on the basis that she held a certificate in cosmetology, and that the Employee was to be paid $15.00 per hour after supplying proof of the certificate. The Employer alleges that Ms. Viskovic did not have the qualification, but the Employer paid minimum wages to the Employee for the hours worked, as required by the *Act*.

The Delegate apparently proceeded with the hearing because both parties were given notice of the date, and Ms. Viskovic did not ask for an adjournment or attend the hearing. Notice of a hearing is fundamental to natural justice. Ms. Viskovic does not dispute that she was given notice of the hearing. Once a party is given a notice of hearing, and the party is unable to proceed on the date set, it is up to that party to apply for an adjournment of the hearing. In this case, it appears Ms. Viskovic did not apply for an adjournment of the hearing before the Delegate, and she has not given any particulars of her reasons for non-attendance, other than to characterize her reason as a good reason. The burden rests with the party alleging an error of natural justice, to demonstrate that error. I am not satisfied that the Employee has shown an error in natural justice. Absent an error in natural justice, this Determination must stand. The Employee has, in essence alleged an error in the finding of facts, and there was an evidentiary basis for the Delegate's finding. I am not satisfied that there was any palpable error in the Delegate's finding that the Employee was not entitled to wages.

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 Employee, the written submissions of the Employer, Employee, reading the Determination and the record supplied by the Delegate. The Delegate conducted an hearing into this matter on March 10, 2003, and issued the Determination and written reasons on March 17, 2003.

Ms. Viskovic provided her written complaint and written submissions to the Delegate. Her evidence was that she had made an oral arrangement with the Employer, Facade Couture Inc. (the "Employer") to work

20 hours minimum per month as an aesthetician, and be paid $15.00 per hour. She says that she quit because the Employer, in essence," reneged" on the guarantee after she worked some hours. The Employer's version was that she was to be paid $15.00 per hour once she provided the Employer with a certification of cosmetology as a fully certified aesthetician. Ms. Viskovic quit before providing the certificate. The Employer believes that Ms. Viskovic did not hold such a certificate. The Employer paid Ms. Viskovic for 5 3/4 hours of work at the minimum wage of $8.00 per hour or $46.00. The Delegate decided the case on the basis of the Employer's evidence only, as the Employee did not attend the hearing.

The record submitted by the Delegate does not contain any notices sent to the parties concerning the hearing before the Delegate. There is an allegation by the Employee that she gave a good reason to the Delegate for not being able to come to the hearing. Particulars were not provided of the good reason. The only information from the Delegate bearing on this point is the comment of the Delegate in the Determination:

Although properly notified, Viskovic failed to attend the hearing or otherwise contact the Adjudicator to request an adjournment. Although Viskovic could have attended before me to give evidence on her own behalf, she chose not to do so. Accordingly I have no reason to dispute the evidence provided by Ruginis that no regular wages are owed over and above the $8.00 per hour.

Employee's Submission:

The Employee submits that the Delegate should have found that her wages were $15.00 per hour. She says that she was told at the time of hiring that her wages would be $15.00 per hour, and that she would be guaranteed 20 hours per week. After the employee worked a number of hours, she quit because she alleges, the Employer "reneged" on the hourly rate and the hours guaranteed. The Employee alleges that the Delegate received her call before the hearing and her reason not to attend. The Employee alleges an error due to natural justice. The Employee claims that this matter should be referred back for further investigation by the Delegate, and that penalties should be issued against the Employer. The Employee claims she is owed a further $46.00.

Employer's Submission:

The Employer submits that she hired Ms. Viskovic on condition that Ms. Viskovic supply proof that she was certified as an aesthetician with the Cosmetologist's Association of B.C. Once Ms. Viskovic supplied proof she would be paid $15.00 per hour. The Employer submits that Ms. Viskovic was not certified, and the Employer paid her minimum wage for the hours worked.

Delegate's Argument:

The Delegate provided the record, but did not provide a submission.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employee, 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.

Under the new operating model of the Employment Standards Branch, following the 2002 amendments to the *Act*, it is open to the Delegate to conduct a hearing into the complaint made by the Employee. The Delegate chose to conduct a hearing in this case, rather than an investigation, and issued the Determination. It is not entirely clear from the Determination, why the Delegate chose to conduct a hearing rather than an investigation of the complaint. It may be because of the nature of the dispute, which is in essence an issue of credibility arising from the Employee's complaint of a breach of the *Act*, concerning an "oral contract of hire".

Each party appears to have a different version of the terms of hiring and therefore, credibility is an issue. The terms of the hiring contract, however, is a question of fact. The Delegate determined this issue of fact, after a hearing, in which only the Employer attended and gave evidence. The issue of credibility was not present in the hearing, because the Employee did not attend the hearing. The Delegate found that the Employer had paid at least minimum wage for the hours worked. The Delegate accepted the Employer's version of the contract concerning the presentation of certificate as essential, for the Employee to be paid the rate of $15.00 per hour

The Employee alleges a breach of natural justice, which has affected the "fact finding process". The Employee alleges, in essence, an error in the fact finding of the Delegate. She alleges that the Delegate should have found a wage entitlement based on "her version", that the Employer agreed to pay her $15.00 per hour, rather than the minimum wage finding of the Delegate. Absent an error in natural justice, this is a pure issue of fact. The Employer presented a version of facts at the hearing, which was accepted by the Delegate. There was evidence before the Delegate to support the finding set out in the Determination, and I am unable to say that the finding of the Delegate was unreasonable, or that there was a palpable error. The findings made by the Delegate, in these circumstances, cannot be said to be an error of law. Absent a finding of a breach of natural justice, the Determination must stand because there is a reasoned basis, supported by evidence, for the findings set out in the Determination.

The Employee alleges a breach of natural justice. She alleges that the Delegate proceeded to determine the case without hearing her side of the story. It appears from the Determination that both the Employer and Employee were given notice of the hearing. The Employee did not attend. She says that she gave a good reason for not attending the hearing, but she has not given any particulars in her appeal submission.

In my view, it is not an error for the Delegate to proceed and determine a case on the basis of the evidence of one party only, provided that the non-attending party has been given notice of a hearing. Notice of a hearing is a fundamental requirement of natural justice. There is some evidence in the Determination that

Ms. Viskovic was given advance notice of the hearing. This has not been contradicted by Ms. Viskovic. I conclude that Ms. Viskovic was given notice of the hearing.

It is up to a party who cannot proceed on a date set for hearing, to apply to the Delegate for an adjournment of the hearing. I am not satisfied that Ms. Viskovic ever asked the Delegate to adjourn the hearing. In reading Ms. Viskovic's submission to the Tribunal, I am not satisfied that she established a reason for not attending the hearing, that she requested an adjournment or that the Delegate unreasonably denied an adjournment application.

On the evidence before me, I am unable to find a breach of natural justice. As I indicated earlier, there was an evidentiary basis supporting the Delegate's finding of fact. As the Employee has not established a breach of natural justice, I dismiss this appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated March 17, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal