

An appeal

- by -

607730 B.C. Ltd operating Olde England Inn  
("Olde England Inn")

- 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

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2004A/150

**DATE OF DECISION:** October 20, 2004

## DECISION

### SUBMISSIONS

Maria Hernandez	on behalf of Olde England Inn
Tami Wilson	on behalf of the Director of Employment Standards
Suzanne Parker	on her own behalf

### OVERVIEW

This is an appeal by 607730 B.C. Ltd. operating Olde England Inn ("Olde England Inn"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued July 19, 2004.

Suzanne Parker worked as a room attendant for Olde England Inn, a hospitality resort, from April 18, 2003 until January 15, 2004. Ms. Parker filed a complaint alleging that she had been laid off in excess of 13 weeks, that she was not recalled, and that she was entitled to compensation for length of service.

On June 10, 2004, the Director's delegate sent the parties a Notice of Hearing to be held July 14, 2004, along with a Demand for Records. The records were to be delivered to the delegate by June 23, 2004. At the date of the hearing into Ms. Parker's complaint, Ms. Parker appeared on her own behalf, no one appeared on behalf of the employer, even though it had been notified, by registered mail, of the date and place of the hearing.

Olde England Inn did not provide the delegate with Ms. Parker's employment records, either by June 23, 2004, or at all. Ms. Parker provided the delegate with her Record of Employment ("ROE") dated November 19, 2003. The ROE indicated that it had been issued for "other" reasons, with further notations indicating "reduction in hours employee still employed". Ms. Parker's evidence was that business had slowed down, and that she continued to work, although at reduced hours, until January 15, 2004. On January 15, 2004, another ROE was issued, again for "other" reasons, those being "temp layoff due to renovation". Ms. Parker was never called back to work.

The delegate found that Ms. Parker was given notice of a temporary layoff on January 15, 2004, and that she was not recalled back to work within 13 weeks as provided under the temporary layoff definition contained in section 1 of the Act.

The delegate did not find either ROE to constitute a notice of termination, as both clearly indicated a temporary layoff, and that Ms. Parker continued to work after the first ROE was issued.

Based on the evidence of Ms. Parker, which the delegate found to be credible, the delegate determined that Olde England Inn contravened Section 63 of the *Employment Standards Act* in failing to pay Ms. Parker compensation for length of service.

The delegate determined that Ms. Parker was entitled to payment in the total amount of \$439.87, including vacation pay and interest. The delegate also imposed a \$500 penalty on Olde England Inn for a contravention of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.

Olde England Inn contends that evidence has become available that was not available at the time the Determination was being made.

Although Olde England Inn sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties.

## **ISSUE**

Whether there is new and relevant evidence that would lead the delegate to a different conclusion on the issue of whether Ms. Parker is entitled to wages in the amount of \$439.87 or on the imposition of the administrative penalty.

## **ARGUMENT**

Olde England Inn argues that Ms. Parker was paid her vacation pay, although it was incorrectly identified as “severance pay” on her cheque. The employer also says that the administrative penalty should not apply because no one from the employer could attend the hearing due to a family emergency.

The delegate submits that the “new evidence” was available at the time of the hearing, and ought to have been provided either at the hearing or in advance of the hearing. She submits that the employer never notified her of their circumstances or requested an adjournment. Further, she submits that the employer gives no reasons why it was unable to comply with the Demand for Records by June 23, 2004.

Finally, the delegate notes that the employer does not dispute the award with respect to the compensation for length of service, and says that vacation pay is calculated on this amount in addition to the vacation pay already paid to Ms. Parker.

Ms. Parker sought to have the Determination upheld.

## **THE FACTS AND ANALYSIS**

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

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

The burden of establishing the grounds for an appeal rests with an Appellant. Although the stated grounds of the appeal are that new evidence has become available, in the body of the appeal the employer also suggests it was unable to appear at the hearing because of a family emergency. I infer that the

employer is suggesting that, because it was unable to appear, its evidence was not considered by the delegate.

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

While I accept that the employer's representative may have had a family emergency preventing them from appearing at the hearing, of which they provided no evidence other than their written assertion, they did not provide any of the documentation by the date indicated on the Demand for Records, or at any time. Furthermore, they did not communicate with the delegate about their circumstances at any time or seek an adjournment. The Notice of Hearing clearly indicates that a failure to attend the hearing or reply could result in a decision without the input of the employer.

It is not clear, from the employer's submission, what the "new evidence" is. No documentation accompanied the appeal form. While the employer refers to a cheque number, a copy of that cheque was not included. In the list of exhibits presented at the hearing, a cheque stub corresponding to that number suggests that an amount of \$41.03 had been paid for unexplained reasons. This cheque is not new evidence. It was presented at the hearing, and considered by the delegate.

However, even if the information submitted on appeal had not been considered by the delegate, I find there would be no change to the result. The vacation pay referred to in the Determination is calculated on the additional amount owed to Ms. Parker as compensation for length of service, which the employer does not dispute.

The administrative penalty was imposed for a contravention of the Act, and is automatic on a finding of a contravention. This amount would have been imposed whether or not the employer appeared at the hearing.

The appeal is dismissed.

**ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination, dated July 19, 2004, be confirmed in the amount of \$939.67, plus whatever interest might have accrued since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**