

An appeal

- by -

CDL Disposal Ltd.
("CDL")

- 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: Ian Lawson

FILE No.: 2004A/151

DATE OF DECISION: November 3, 2004

DECISION

SUBMISSIONS

Bryan Wickham	On behalf of CDL Disposal Ltd.
Ivy Hallam	On behalf of the Director of Employment Standards
John G. Wright	On his own behalf

OVERVIEW

This is an appeal by CDL Disposal Ltd. ("CDL") pursuant to section 112 of the *Act*. The appeal is from Determination ER#115364 issued by Ivy Hallam, a delegate of the Director of Employment Standards, on July 21, 2004. The Determination required CDL to pay wages, vacation pay, statutory holiday pay and interest to John G. Wright ("Wright") in the total amount of \$2,102.78, together with four administrative penalties in the amount of \$500.00 each.

CDL filed its appeal on August 4, 2004. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

CDL is a disposal trucking company in the Vancouver area and it employed Wright as a truck driver from February 6, 2002 to December 20 or 21, 2002. Wright filed a complaint with the Director that he had not been paid vacation pay, overtime wages and statutory holiday pay, and that improper deductions had been made from his wages. The delegate elected to conduct a complaint hearing on November 7, 2003, and on September 23, 2003, a Notice of Complaint Hearing was sent to CDL by registered mail. This mail was not claimed. On October 30, 2003, a Revised Notice of Complaint Hearing was sent to CDL by registered mail, giving second notice of the November 7 complaint hearing. The hearing proceeded on November 7 in the absence of CDL. The delegate later learned that CDL did not claim the second registered letter until November 10.

The delegate further reports that on June 20, 2003, an administrative assistant telephoned Brian Wickham, a director/officer of CDL, to inform him of Wright's complaint and the mediation/adjudication process. A Notice of Mediation was sent to CDL by registered mail on August 13, 2003, giving notice of a mediation session to be conducted on September 17, 2003. The Canada Post website revealed the Notice had been delivered on August 14, 2003, but CDL did not attend the mediation session.

At the November 7 complaint hearing, the delegate heard from Wright that three separate deductions of \$123.00 each were made from his wages in November and December, 2002, on account of an alleged overpayment of his wages by CDL in May, June and July, 2002. He did not agree that he had been overpaid, but was required to sign the pay cheques containing these deductions, purportedly to indicate his agreement to same. Wright claimed he had never been paid vacation pay or statutory holiday pay, and he did not take vacation time while employed. Wright also claimed he was owed overtime wages, but he did not have a record of his hours of work. The delegate sent a Demand for Employer Records to CDL,

which was not complied with. Wright stated that when he picked up his last pay cheque, he was required to sign a letter in order to receive his cheque. The letter provided that instead of being paid \$15.00 per hour, Wright would be paid \$18.00 per hour, which included statutory holiday pay, vacation pay and overtime wages for the period from August 1, 2002 to December 23, 2002. Wright further stated that CDL deducted cell phone bills from his wages, respecting a cell phone CDL provided for Wright to use instead of a two-way radio while at work.

In her Determination, the delegate accepted Wright's evidence that he signed CDL's letter only in order to receive his final pay cheque. She also found that where the letter purported to be a waiver of any minimum employment standard, it was of no effect pursuant to section 4 of the *Act*. The delegate made no award for overtime wages on account of Wright's inability to produce any record of his hours, but she imposed an administrative penalty on CDL for its failure to produce records. In doing so, the delegate relied on section 122 of the *Act*, which provides that a demand is deemed to have been served if sent by registered mail to the person's last known address. The delegate found CDL owed vacation pay and statutory holiday pay, but in the absence of payroll records, she was only able to calculate these based on the gross amounts from Wright's pay stubs. The delegate accepted that Wright never agreed he had been overpaid, and ordered CDL to return the three deductions of \$123.00 each from Wright's wages. She further ordered CDL to return the cell phone bill deductions, as this was a business cost which no employer is able to recover from employees pursuant to section 21(2) of the *Act*, and because Wright had not signed any written authorization for these deductions, pursuant to section 22(4) of the *Act*.

In its Appeal Form, CDL alleges the Director failed to observe the principles of natural justice in making the Determination, because CDL did not receive notice of the complaint hearing. CDL also claims that evidence has become available that was not available at the time the Determination was being made, which it particularizes as follows:

- “1. Mr. Wright drove truck while under the influence of crack cocaine, would dissappear [*sic*].
2. Mr. Wright embezzled \$7,000.00 (estimated) of which he admitted to \$2,600 which was recovered (recently discovered).
3. Mr. Wright would fall asleep (woken up by customers who reported it to CDL) and would dissappear [*sic*] for hours with no explanation.”

In a written submission dated October 8, 2004, CDL states:

In response to Ms. Ivy Hallam's letter to the Tribunal, dated September 3, 2004, CDL reiterates that notice of the second hearing was NOT received until after the hearing date. *It was impossible for Mr. Wickham to receive such notice, as he was being held in custody at the North Fraser Pretrial facility from October 26th until November 5th, 2003 on an unrelated matter. The Director did not contact CDL to ask why CDL did not attend the hearing. [emphasis in original]*

CDL submits that it wishes to adduce documentary evidence relating to a number of serious failings on the part of Wright, including his alleged addiction to narcotics, various acts of extortion, fraud, theft, poor attendance at work, and complaints from customers. CDL states “[e]yewitnesses will also testify that they observed Mr. Wright smoking crack cocaine and trading sex for drugs with prostitutes in the presence of his 10-year old boy... (this was on a work night, the next day he did not show up for work).” A number of other similarly damning allegations are contained in the balance of CDL's written submission.

ISSUES

1. Whether the delegate failed to observe the principles of natural justice by proceeding with the complaint hearing on November 7, 2003.
2. Whether CDL ought to be permitted to present evidence that was not available at the time the Determination was being made.

ANALYSIS

1) The Natural Justice Issue

Recent amendments to the *Act* modified the manner in which the Director may handle complaints. Section 76 now reads, in part:

- 76 (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.
- (2) The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.
 - (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if ...

The remainder of subsection (3) enumerates nine circumstances in which the Director may refuse, stop or postpone handling a complaint. The power to “adjudicate” is therefore bestowed upon the Director, albeit indirectly through subsection (3). The “Complaint Hearing” is one of the ways the Director has developed to adjudicate complaints. The “Notice of Complaint Hearing” is used to give the parties notice of Complaint Hearings.

Section 77 of the *Act* reads as follows:

- 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

Giving fair notice of the Complaint Hearing and allowing fair opportunity to be heard would therefore be key requirements of the Director’s adjudication process. The right to notice and to be heard, however is not absolute. Section 77 requires only that “reasonable efforts” be made. Neither the *Act* nor the *Regulation* address Complaint Hearings and there is no legislative direction as to how and when a Notice of Complaint Hearing is to be served, or when the Notice may be deemed to be served. Some guidance may be found by analogy, in section 122 of the *Act*:

- 122 (1) A determination or demand that is required to be served on a person under this Act is deemed to have been served if
- (a) served on the person, or
 - (b) sent by registered mail to the person’s last known address.
- (2) If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.

If the same rules were to apply to the delivery of a Notice of Complaint Hearing (and I see no reason why they would not), CDL would have been deemed served with the first Notice sent by registered mail on September 23, 2003. Confirmation of delivery would not have been a prerequisite (as it is not under section 122(2)), and the delegate need not have mailed a second Notice, as was done on October 30, 2003. CDL's lack of response to the Director's Notice of Mediation may indicate of lack of interest on CDL's part, and is relevant when reviewing whether a breach of natural justice has occurred. In any event, I am satisfied the Director made reasonable efforts to give CDL an opportunity to respond to the Complaint Hearing held on November 7, 2004.

CDL argues that it did not have actual notice, as a result of Mr. Wickham's incarceration. CDL provides no other information as to why and how Mr. Wickham's incarceration rendered the company inoperative or somehow incapable of receiving its mail. Further, if Mr. Wickham was essential to the company's daily administration, no explanation is given for the apparent failure to deal with his extended absence in any way. I am not persuaded that this alleged lack of actual notice amounts to any breach of natural justice in the unusual circumstances of this case, and CDL's appeal on the natural justice issue must be dismissed.

2) The Fresh Evidence Issue

An appellant before this Tribunal will not normally be able to tender evidence at the appeal if that evidence had not been presented to the delegate (see *Tri-West Tractor Ltd.*, BC EST #D268/96, and *Kaiser Stables Ltd.*, BC EST #D058/97). In the absence of some extraordinary reason for failing to present the evidence to the delegate, an appellant may not "lie in the weeds" and present important evidence only after a Determination has been issued against their interest. My review of CDL's submissions lead me to conclude that all of the damning evidence CDL now seeks to tender was available at the time the Determination was being made. In particular, CDL provides no information to support the second point stated in its Appeal Form, that Wright had embezzled \$7,000 and that this had been "recently discovered." All of the other allegations appear to have been known to CDL by the time Wright's complaint was made.

In any event, none of the many serious allegations contained in this "fresh" evidence has any relevance to CDL's appeal. Wright's conduct has nothing to do with the question whether he was paid wages, vacation pay and statutory holiday pay as required by the *Act*. I am certainly aware of Wright's submission to the effect that none of CDL's outrageous allegations are true, and that the embezzlement allegation in particular related to another employee. I find it is not necessary to rely on Wright's submission, as CDL has failed to satisfy me it has any relevant evidence that was unavailable when the Determination was being made, and CDL's appeal on this ground must also be dismissed.

ORDER

Pursuant to section 115(1) of the Act, the appeal is dismissed and Determination ER#115364 issued on July 21, 2004 is confirmed, with interest pursuant to section 88.

Ian Lawson
Member
Employment Standards Tribunal