Employment Standards
TRIBUNAL

An appeal

\- by -

Abai Ossoble
(“Ossoble”)

\- 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: David B. Stevenson

FILE No.: 2003A/133

DATE OF DECISION: July 15, 2003

British Columbia

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Abai Ossoble ("Ossoble") of a Determination that was issued on April 25, 2003 by a delegate of the Director of Employment Standards (the "Director"). Ossoble filed a complaint with the Director alleging he was owed wages for work he had performed for Nu-Tech Express Ltd. ("Nu-Tech"). The Director investigated the complaint and found no evidence supporting the allegations made. As a result, the Director ceased investigating and closed the file on the complaint.

Ossoble has appealed the Determination on the grounds that the Director erred in law and failed to comply with principles of natural justice in making the Determination.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue is whether Ossoble has shown that the Director has made an error of law or has failed to comply with principles of natural justice in making the Determination.

FACTS

The Determination provides the following background information:

> The complainant did not keep a copy of his self-help kit. He supplied a complaint form that stated he was employed by Nu-Tech on August 15 and 17, 2002 at the rate of $10.00 per hour. In support of this Ossoble supplied, in his complaint form, a written record of hours worked.

The record required to be provided by the Director to the Tribunal under subsection 112(5) comprises a copy of the appeal form, a copy of the complaint, a copy of the Determination, with reasons.

The complaint was filed with the Director on October 15, 2002. While it is not found in the record, it appears from other material on file that the Director attempted to mediate the complaint on March 12, 2003. Ossoble attended the mediation session, no one attended the session on behalf of Nu-Tech. Through the complaint and mediation process, Ossoble provided information in support of his claim:

- he worked for Nu-Tech as a pressure washer
- he worked August 15 and August 17, 2002 for 7 hours on each day;
- his rate of pay was $10.00 an hour;
- he was offered a job, and hired, by Garry Grewal, the owner of the company;
- he picked up the company van on August 15 and went to a client named Elke Brothers where he worked for 2 days;
- when Ossoble asked for payment for his work, he was informed by Grewal that he (Grewal) and his partner were not getting along, that the business was ceasing and that he could not pay Ossoble as his partner had taken all the money.

At the mediation session, Ossoble provided and signed a statement of facts. The facts were consistent with what he had alleged in his complaint.

The Director decided to conduct a hearing on the complaint and the Determination notes a notice of hearing was sent by registered mail and was "successfully delivered to the customer", although it does not indicate whom "the customer" was. The notice of hearing was not included in the record. The Determination notes a hearing was held on April 4, 2003 and that neither Ossoble nor any representative of the employer attended that hearing. The Determination says:

> The adjudicator contacted Nu-Tech by phone on April 4, 2003 and was told that he would not be attending the hearing as Ossoble had already been paid all he was owed.
>
> . . .
>
> Other than the complaint form provided Ossoble did not participate in the hearing. On April 3, 2003 Ossoble left a phone message that he would not be attending the hearing as he had found new employment and could not afford to take the time off.

Based on the failure of the parties, particularly Ossoble, to attend the hearing, the Director decided to cease investigating the complaint, referring to subsections 76(3)(d) and 76(3)(e) in support of that decision.

Ossoble alleges he called the Director before the hearing date. He was connected to the delegate responsible for the hearing, told the delegate that he couldn't make the hearing because of work and asked that the hearing be changed to any other time after 3:00 pm. He says that the delegate told him it would be hard to change the time, but would see what he could do. That allegation is not contradicted by the Director, who has, in fact, provided no submissions at all on the appeal.

ARGUMENT AND ANALYSIS

The burden in this appeal is on Ossoble to persuade the Tribunal that the Determination is wrong in some way that would justify the intervention of the Tribunal under Section 115 of the *Act*.

I see no basis for concluding the Director committed any error in law. I find, however, that the Director has failed to comply with principles of natural justice in making the Determination.

Under the *Act*, the Director is authorized to resolve complaints. The *Act* expressly contemplates the Director may resolve complaints made under the *Act* by utilizing a number of possible processes, including investigation, mediation and adjudication. It is trite that when resolving complaints the Director owes a duty to comply with the rules of natural justice. Natural justice is not a difficult or complicated concept. In Reid and David, *Administrative Law and Practice*, 2nd ed., the authors state, at p. 213: "Natural justice is a simple concept that may be defined completely in simple terms: natural justice is fair play, nothing more." Notwithstanding the simplicity in the concept, its application may vary. In *Kane v. Board of the University of British Columbia* (1980) 110 D.L.R. (3rd) 311, the Court stated, at page 322:

> In any particular case the rules of natural justice will depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject matter that is being dealt with . . ."

The reference in subsection 76(3) to "adjudicate" implies the Director may choose to resolve a complaint through a hearing process. In this case, following an unsuccessful effort to mediate the complaint, the Director decided to hold an oral hearing. In deciding to hold an oral hearing, the Director assumed an adjudicative function and, as such, owes a general duty of fairness to the parties whose interests are being considered that approaches the full panoply of the principles of natural justice (see the comments of Sopinka, J. in *S.E.P.Q.A. v. Canadian Human Rights Commission*, [1989] 2 S.C.R. 879 at 899). That duty includes a responsibility to act judiciously. The refusal by an adjudicative body to grant an adjournment can amount to a denial of natural justice. A fair hearing requires that the parties be given an opportunity to be heard. Natural justice requires there to be sound reasons for refusing to grant an adjournment. Simply stating that "no formal requests for adjournments were received" does not satisfy the duty to act judiciously nor, in the circumstances, does it provide any reason for not adjourning the hearing and thereby denying Ossoble a right to be heard.

I do not suggest the Director may never refuse a request for an adjournment or that a rule which normally requires requests to be in writing is not reasonable, but the application and operation of any rule must ultimately give way to considerations of fairness and natural justice. After all, one of the purposes of the *Act* is to provide "fair and efficient" procedures for resolving disputes under the *Act*. Undoubtedly, the Director may refuse an adjournment on proper grounds, but is not allowed to act capriciously, or in disregard of the rights of others. Where such conduct appears and results in a denial of natural justice, the Tribunal will intervene to ensure the process is fair. In this case, I am struck by two things: first, after having told Ossoble 'he would see what he could do' (about rescheduling the hearing), there is no indication the delegate with whom Ossoble talked made any effort to do anything, including communicating back to Ossoble; and second, there is no reference, either in the Determination or in the Director's reply to the appeal, to the request by Ossoble for an adjournment and rescheduling of the complaint hearing and, following from that, no indication why the hearing could not be rescheduled to accommodate Ossoble's work commitments. In respect of the second point, I note that another of the purposes of the *Act* is to *"contribute in assisting employees to meet work and family responsibilities"*.

The appeal succeeds.

The matter will be referred back to the Director. The only fair thing is to schedule another hearing on the complaint, accommodating Ossoble's work commitments (unless there are sound reasons why that cannot be done), before a delegate other than the one assigned to hold the April 4, 2003 hearing.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 25, 2003 be referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal