

An appeal

- by -

Vicky's Furniture Factory Ltd. also known as 576077 British Columbia Ltd. operating as Oak Forever Furniture

("Vicky's")

- 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: Ib S. Petersen

FILE No.: 2002/145

DATE OF DECISION: June 6, 2002



DECISION

APPEARANCES

Mr. James Klassen

Ms. D. Lynne Fanthorpe

counsel, on behalf of the Appellant

on behalf of the Director

FACTS AND ANALYSIS

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director issued on February 28, 2002. The Determination concluded that three employees were owed \$35,904.53 by the Appellant on account of wages, vacation pay and statutory holiday pay.

The Determination is essentially a "re-issue" of a March 2001 determination made against Oak Forever Furniture Ltd., which, I concluded in #D516/01, was not the employer of the complainant employees. Subsequently, on or about January 30, 2002, it would appear, the Delegate sent a letter to the principal of the Appellant at his home address, indicated on the corporate records, and to the Appellant's (former) business address. The letters, inviting a response to the complaints, were sent by regular mail and the Appellant asserts that it never received them.

The Appellant participated in the earlier appeal with its counsel and, at that time, indicated that it may have been the employer of the complainants and wished to reply to the allegations. It asserted then, as now, that the Delegate had failed to allow it an opportunity to respond. The Appellant says that the Delegate did not contact its counsel nor, indeed, serve notice of any investigation on its registered and records office.

The Delegate opposes the appeal. In her view, the Appellant knew of the complaints from its participation in the original appeal and could have provided any information to contradict the claims made by the complainants. As well, she asserts that the letters sent to the principal of the Appellant and the Appellant in the course of the original appeal and the January 30 letters were not returned by Canada Post and, thus, in all likelihood, were received by them. The Appellant ought not to be allowed to place new information before the Tribunal.

While I am greatly concerned--and appreciate--that the complainant employees may have been left without a proper remedy for a long time, assuming that their complaints are meritorious, I am of the view that the Delegate failed to allow the Appellant a reasonable opportunity to participate in the investigation. There is, unfortunately, in the circumstances, no reliable evidence that the Appellant ever received the demand for information. The Appellant denies receiving it. The principal of the Appellant participated in the original appeal and, in my opinion, the Delegate could have contacted its counsel without much effort (his business address is in the same building as the Branch). Alternatively, the Delegate could have served the Appellant in accordance with the *Company Act* at its registered and records office, by registered mail, prior to issuing the Determination now under appeal (see also Section 122 of the *Act*). The delegate did not do that. Again, this could have been done without much effort. In the circumstances, I find that the Delegate's efforts are insufficient and do not meet the requirements of Section 77 of the *Act*.

Briefly put, I am of the view that the Appellant has shown that the Delegate failed to allow it a reasonable opportunity to respond and the appeal is, therefore, upheld. The Determination is cancelled. I hasten to add that the Director is not precluded from proceeding against the Appellant for wages owed to the complainants. However, fundamental principles of natural justice, and, indeed, the *Act*, require that the Appellant be given a

reasonable opportunity to respond to the complaints and that the Director must proceed accordingly. In my view of the time that has passed already, it is imperative that the Director proceeds expeditiously. In the circumstances--and I do not conclude, on the material before me, that the Delegate is in any way biased, or conducted herself in an inappropriate manner--it probably would be advisable, at least from the standpoint of perception, that the Director assigns this matter to a different delegate.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination dated February 28, 2002, be cancelled.

Ib S. Petersen Adjudicator Employment Standards Tribunal