

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Tina Argenti
(the “ Appellant ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kim Polowek

FILE NO.: 2000/252

DATE OF HEARING: July 17, 2000

DATE OF DECISION: August 11, 2000

DECISION

APPEARANCES

Tina Argenti	on her own behalf
Sue Kim	on behalf of Coast Deli “O” Inc.
Sahel Soroush	on behalf of Coast Deli “O” Inc.
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal by Tina Argenti pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated March 15, 2000 issued by a delegate of the Director of Employment Standards (the “Director”). Tina Argenti (“Argenti”) alleges that the delegate of the Director erred in the Determination by not investigating and addressing in the Determination her complaints relating to Employer Coast Deli “O” Inc. (“Coast Deli”). These complaints relate to wage statements, hours of work and shift notices, annual vacation entitlement, and timeliness issues with respect to the record of employment and termination pay. Argenti also alleges that the Determination incorrectly documented her complaints regarding meal breaks and hours free from work each week, as well as reported inaccurate dates of termination, payment for last day of work and vacation pay. Finally, Argenti alleges that the Determination does not comply with the principles of natural justice due to the alleged neglect of the delegate of the Director to apply all the evidence submitted and the unsatisfactory investigation of her complaints.

The Determination dated March 15, 2000 concluded that Argenti was not dismissed for just cause and was entitled to compensation for length of service. The Determination also concluded that Argenti was entitled to overtime, vacation pay and regular wages.

The Employment Standards Tribunal convened the hearing relating to this appeal at 9:05 a.m. on July 17, 2000.

ISSUE(S) TO BE DECIDED

These reasons do not address the merits of Argenti’s appeal as the matter is referred back to the Director for further investigation and document disclosure. The issue to be decided in this case is whether the documentation provided by the Employer should have been accepted by the delegate of the Director (“the Director”) without giving Argenti the opportunity to know and respond to such evidence.

PRELIMINARY MATTERS

At the outset of the hearing and during the process of explaining the hearing process, it became evident that matters related to both document disclosure and the availability of documents required exploration and clarification prior to conducting a hearing. This was viewed as necessary given the fact that the Tribunal, as a quasi-judicial tribunal, is governed by the rules of natural justice and procedural fairness.

Argenti stated that during one of her first meetings with the delegate of the Director (“the Director”) she verbally requested that she be permitted access to all payroll and work related records provided by Coast Deli to the Director. Argenti was unable to recall the exact date of her verbal request. Argenti alleged that her request to review the records of Coast Deli was not fulfilled by the Director prior to the issuance of the Determination. Thus, Argenti stated that she was not provided with an opportunity to see or respond to the documents provided by Coast Deli before the Determination was made. Argenti stated that her inability to review these payroll records impaired her ability to provide supporting documentation for her complaint and to respond to allegations contained in employer submissions. Argenti alleged that as Coast Deli failed to provide her with wage statements, her request to review Coast Deli’s payroll records and timesheets was necessary for her to have a full opportunity to prepare her case.

Sue Kim (“Kim”) of Coast Deli stated that she telephoned the Director to request the return of the original payroll records and timesheets that she had forwarded to the Director. Kim indicated that she was not aware of the date of her telephone call to the Director but believed it to be shortly after receiving a letter from the Tribunal (dated April 11, 2000) instructing her that she must include a copy of all records and documents in support of her own Appeal to the Tribunal. Kim stated that the Director informed her that he would be present at the Tribunal hearing and would bring her requested documentation to the hearing. The delegate of the Director of Employment Standards was not present at the hearing.

Based on the alleged significance of the payroll records and timesheets to both parties, the fact that the documents were not available at the hearing, and concerns regarding procedural fairness and natural justice in the conduct of the investigation by the Director, I made the decision to cease the hearing proceedings and refer the matter back to the Director for further investigation and document disclosure.

ANALYSIS

The “quasi-judicial” capacity of the Director when conducting investigations and making determinations was set forth in a decision of the Tribunal *BWI Business World Incorporated* BC EST #D050/96. Once a complaint has been filed, the Director has both an investigative and adjudicative role.

When investigating a complaint, the Director is specifically directed to make “reasonable efforts” to give the “person under investigation”, (in almost all cases the Employer), “an opportunity to respond” (Section 77). At the investigative state, the Director must, subject to Section 76(2), enquire into the complaint, receive submissions from the parties, and ultimately, make a decision that affects the rights and interests of both the employer and employee(s).

Argenti states that the delegate of the Director, during his investigation, neglected to provide documents provided by the Employer. These documents are referred to in the Determination and include timesheets and payroll records.

I start with the proposition that Section 77 does not, nor was it intended to, create a “discovery” obligation such as that found in the B.C. Supreme Court Rules whereby documents are presumptively inadmissible-and therefore cannot be relied on by a party—in the absence of prior disclosure. As well, it is acknowledged that under the *Act*, there is no specific legislative requirement that the Director disclose all information received by the Director to all parties involved. As noted in the decision of the Tribunal *BWI Business World Incorporated* BC EST #D050/96:

When conducting an investigation, the Director will typically gather evidence from each of the parties but will rarely, if ever, convene a hearing at which both parties are present. Accordingly, neither the employer nor the employee will necessarily know precisely what the other has alleged or what particular documentation has been provided to the Director.

On the other hand, where the documents in question are key documents, ie., documents that seemingly have significant probative value insofar as the complaint is concerned, such documents (or at least a summary of their contents) ought to be disclosed prior to the issuance of a determination so that the person under investigation may respond to the documents if they wish (*Urban Native Indian Education Society* BC EST #D309/99). While Argenti is not the “person under investigation”, the documents in question, namely payroll records and timesheets, clearly represent documents of significant probative value for both parties. In Argenti’s original complaint to the Employment Standards Branch, she alleged that she was not provided with wage statements as required under the *Act*. Accordingly, it is evident that the disclosure of timesheets and payroll records assume a significant probative value to Argenti.

There was no evidence before the Tribunal that the delegate of the Director had disclosed the timesheets or payroll records to Argenti before the issuance of the Determination.

The Tribunal does have the authority to order disclosure and production of documents. As noted in *Brar et al.*, BCEST #D072/00, at 5-6:

“The Tribunal’s powers set out in Section 109 of the *Act* “are in addition to its powers under Section 108” and include, inter alia, the authority:

- to inspect records that may be relevant (109(1)(e))
- to “require a person to disclose, either orally or in writing, a matter under this *Act* and require the disclosure to be made under oath or affirmation” (109(1)(g))
- to order a person to produce, or delivery to a place specified by the Tribunal, any records for inspection under paragraph (e) (109(1)(h))

Although the Tribunal can issue pre-hearing document production orders, the Tribunal can only,

in my view, order the production of documents that “may be relevant to an appeal, reconsideration or recommendation” (Section 109(1)(e)).

The onus is upon the applicant to satisfy me that the documents sought to be produced “may be relevant”. An assessment of what documents “may be relevant must be driven by the Determination itself and by the stated reasons for appealing the Determination.” (see, for example, *Jannex Enterprises (1980) Limited*, BC EST #D200/00).

With the foregoing in mind, I am satisfied that the timesheets and payroll records of the Employer are relevant and Argenti should have been given an opportunity to see them and respond prior to the issuance of a Determination. In her original complaint to the Employment Standards Branch, Argenti alleged that she did not receive wage statements. Furthermore, the failure to disclose the timesheet and payroll records resulted in Argenti not being afforded a fair and full opportunity to respond in accordance with the provisions of Section 77 of the *Act*.

In her appeal submission, Argenti argues that her allegations regarding wage statements, no hours of work notices, no notice of shift changes, annual vacation entitlement, not receiving a record of employment and failure to receive termination pay within 48 hours were not addressed in the Determination. Furthermore, she alleges that the Director erred in his conclusions relating to meal breaks and consecutive hours free from work.

A review of the written correspondence between Argenti and the Director’s delegate finds specific mention of only certain aspects of Argenti’s complaint. A February 15, 2000 letter from the delegate to Argenti outlines as follows:

“Enclosed is a copy the employer’s reply to your allegation that you were not given any meal breaks and that you were wrongfully dismissed.

Please let me have your response to the employer’s allegations within 3 weeks from the date hereof. I am in the process of reviewing the payroll records and timesheets regarding other aspects of your complaint.”

Argenti’s March 3, 2000 letter to the delegate documents as follows:

Enclosed is my response to the employer’s reply to my allegation that I was not given any meal breaks and that I was wrongfully dismissed....Please continue to review all aspects of my complaint and I will provide any and all information I have pertaining to it.

There is no evidence of any further written contact between Argenti and the delegate after Argenti’s March 3, 2000 letter to the delegate regarding the “other aspects of my complaint” referred to in the March 3, 2000 letter. The Determination was subsequently issued by the delegate on March 15, 2000.

It is noted, however, the a letter from the delegate to the Employment Standards Tribunal, received May 1, 2000, notes that “Ms. Argenti was given every opportunity to respond to the employer’s allegation. I had a lengthy meeting with her on November 10, 1999”. Documentation provided by the Employer to the delegate, however, is dated November 23, 1999.

Overall, it appears to me, therefore, that there remain factual issues between the parties to be determined and that, insofar as the Director has records, not yet disclosed, which may pertain to these issues during the material time, these are relevant and should be disclosed and investigated further. Moreover, it is more consistent with the stated purposes of the *Act* to promote fair treatment and open communication of employees and employers that the matter to referred back to the Director for further investigation and document disclosure.

CONCLUSION:

One of the stated purposes of the *Act* is to promote the fair treatment of employees and employers and in this case, under these circumstances, I am persuaded that it is fair and consistent with the principles of natural justice and procedural fairness that I refer this matter back to the Director for further investigation.

ORDER

I Order, under Section 115 of the *Act*, that this matter is referred back to the Director for further investigation of the initial complaint which should include a disclosure of employer payroll records and timesheets to Argenti.

Kim Polowek
Adjudicator
Employment Standards Tribunal