

An appeal

- by -

Jarek Enterprises Ltd.
("Jarek")

- 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.: 2002/297

DATE OF DECISION: August 12, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Jarek Enterprises Ltd. (“Jarek”) of a Determination that was issued on May 9, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Jarek had contravened Section 63 of the *Act* in respect of the employment of Tammy Wudrich (“Wudrich”) and ordered Jarek to cease contravening and to comply with the *Act* and to pay an amount of \$420.49.

The Determination summarized the positions of Jarek and Wudrich, summarized information received from seven witnesses interviewed during the investigation and concluded that Wudrich had been terminated and that Jarek had not shown there was just cause for termination.

Jarek claims the Determination is wrong because, it is alleged, Wudrich and her key witness in the investigation were lying. That is the only reason given for the appeal. In the appeal form Jarek requests an oral hearing, explaining that an oral hearing “is the only way to demonstrate that the witness is lying”.

Generally, the Tribunal will not hold an oral hearing unless it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly (see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)* [2001] B.C.J. No. 1142 (B.C.S.C.)). After considering the Determination, the appeal and the material on file, the Tribunal decided an oral hearing was not necessary in order to adjudicate the appeal.

Jarek was notified on July 8, 2002 that the Tribunal had decided to adjudicate this appeal without an oral hearing. Jarek took issue with that decision in a communication to the Tribunal on July 17, 2002. The Tribunal has not been persuaded by that communication to revisit its decision that an oral hearing is not necessary. In the communication, Jarek also says:

I . . . require 28 days to prepare my written submission that will reveal discrepancies with dates and facts. The ‘facts’ stated by the witnesses in Jennifer Hagen’s original Determination are not, according to those witnesses, the same as originally reported to her. The witnesses indicate that Hagen’s version of their statements is ‘slanted’ and that they’re prepared to sign statements to that effect.

There are two concerns with the above request. First, under the Tribunal’s Rules of Procedure, Jarek was required to provide all relevant information with his appeal. That has not been done. There is nothing in the appeal other than a bald assertion that Wudrich and her witness were lying. Second, Jarek had no reason to presume an oral hearing would be granted. It will become apparent in the reasons for this decision that the decision of the Tribunal to adjudicate this appeal without an oral hearing was correct.

Notwithstanding, the above concerns, the Tribunal allowed Jarek some additional time to file additional material supporting the appeal. Nothing further has been received by Jarek. The appeal will therefore be adjudicated on the basis of the material on file.

ISSUE

The issue in this appeal is whether Jarek has shown an error in the Determination sufficient to persuade the Tribunal to exercise its authority under Section 115 of the *Act* to cancel it or to send it back to the Director for further investigation.

FACTS

Jarek operates a restaurant in Barriere. Wudrich was employed as a waitress at the restaurant from September 1, 2000 to October 3, 2001 at a rate of \$7.60 an hour.

Wudrich complained that she had been terminated without written notice, or compensation for length of service, and without cause. The Determination noted two issues in respect of the complaint: first, whether Wudrich was terminated or quit; and second, if she was terminated, whether there was just cause for her termination. There was no question that Jarek had neither given written notice nor paid length of service compensation. It should also be noted that there is no issue in this appeal about whether Wudrich was terminated or quit. In the appeal submission, Jarek acknowledges that he terminated Wudrich's employment because, "she disobeyed my orders and demonstrated a great deal of disrespect for my business and her fellow employees, causing them a lot of inconvenience in the bargain."

The investigating officer appears to have conducted a comprehensive investigation, receiving information and statements from the complainant, a representative of Jarek, and seven witnesses. The Determination concluded that Wudrich had been dismissed without just cause. The penultimate paragraph in the Determination states:

For these reasons, *whether or not Ms. Wudrich was actually ill is not determinative*. Even if [Mr. Jarek Kotlewski] is correct in his assertion that she wasn't ill, and if he had the evidence to prove that, Mr. Kotlewski does not have just cause to terminate Ms. Wudrich without written notice or compensation for length of service.

(emphasis added)

The Determination found that while Jarek had expressed dissatisfaction in the past with Wudrich missing work, he had never expressed this dissatisfaction in a way that would have indicated to her that her job was in jeopardy. No issue has been taken with that factual conclusion.

ARGUMENT AND ANALYSIS

The burden is on Jarek, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. Placing the burden on the appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)).

In this appeal, Jarek has challenged comments made in the Determination suggesting the investigating officer accepted that Wudrich was ill on October 5 and 6, 2001 and missed her scheduled shifts for that reason. In the appeal submission, Jarek says:

I am convinced that the Respondent, Tammy Wudrich, and her key witness . . . are lying and that Ms. Wudrich was not sick for the shifts in question.

The difficulty for Jarek in raising that matter is demonstrated in the reply of the Director to the appeal, which notes:

Mr. Kotlewski is requesting an oral hearing because he is concerned that Ms. Wudrich was not ill as she claimed, and he does not want her to be rewarded for what he calls “bad work practices and disrespectful attitude”. Although I am aware of Mr. Kotlewski’s concern, in my view that aspect was not the most important factor. The issue was whether, feeling as he did that Ms. Wudrich was not entirely reliable, proper corrective discipline had formed a part of the work relationship, and whether he had just cause to terminate Ms. Wudrich’s employment.

Simply put, the appeal does not address the issues in a way that would allow the Tribunal to exercise its authority under Section 115. I can find no fault with the analysis in the Determination on the question of just cause. The Determination states:

A single incident of absenteeism, or even more than one incident, is not enough to establish just cause so as to relieve the employer from the requirement to give written notice or compensation for length of service. In order to avoid that requirement, the employer must be able to show that the employee was advised of expectations, that the employer has made reasonable efforts to assist the employee in achieving those expectations, and that the employer has specifically told the employee that continued failure to perform to those expectations would result in dismissal.

I agree with the perspective of the Director on this appeal. It does not turn on whether Wudrich was actually ill, but on whether Jarek had just cause to terminate her employment. He has failed to show an error in the Determination on that issue and the appeal must be dismissed. In fact, not only has Jarek not demonstrated an error in the Determination, Jarek has not disputed the factual basis for the finding that Wudrich was terminated without just cause.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 9, 2002 be confirmed in the amount of \$420.49, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal