

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 -

City Heights Management Inc.
("City Heights")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John L. McConchie

FILE NO.: 97/235

DATE OF HEARING: June 9, 1997

DATE OF DECISION: September 2, 1997

DECISION

APPEARANCES

Christopher Chu for City Heights

OVERVIEW

This is an appeal by City Heights pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination issued by the Director of the Employment Standards Branch (the “Director”) and dated March 13, 1997. The Determination found City Heights to be in violation of Sections 17, 18, 20, 21, 27, 28, 31, 57, 58 and 63 of the *Act*. The Determination required City Heights to pay the sum of \$5,989.90 to the complainant Paul Wong on account of unpaid wages and accrued interest.

For reasons which will appear later, it is significant that the complaint was originally made April 16, 1996. The Determination was issued almost a year later. In her Determination, the Director’s delegate remarks on City Heights’ failure to participate in her investigation: “the employer has declined to respond to written requests, including a Demand for Records, for further information and documentation supporting his verbal allegations of improprieties regarding Wong’s departure from the employment relationship.”

A hearing was held on June 9, 1997 at which I heard evidence under oath from Mr. Chu. The complainant, Mr. Wong, did not attend. He wrote to the Tribunal prior to the hearing and said that he would not attend because he feared violence at the hands of Mr. Chu. Mr. Chu also told me at the hearing that he feared violence at the hands of Mr. Wong.

I decided that I would continue with the hearing and take Mr. Chu’s evidence. During the hearing, I told Mr. Chu that I expected that I would write to Mr. Wong at the end of the hearing, explain the potential seriousness of not attending the hearing, and offer him an opportunity to provide testimony.

On reflection, I have decided that it will not be necessary to write to Mr. Wong. For the reasons which follow, the appeal by City Heights must be dismissed on a preliminary point.

ISSUE TO BE DECIDED

The issue at this stage of the proceedings is whether City Heights will be permitted to lead evidence which it refused or neglected to provide to the Director’s delegate. If so, I will adjourn the proceedings and attempt to address the difficulties which have led to Mr. Wong’s refusal to attend the hearings. If not, then City Heights cannot succeed in this appeal and the proceeding will not be extended further.

DECISION

Mr. Chu is the manager of the apartments at which Mr. Wong was resident caretaker. He is also a lawyer with his own firm. Mr. Chu testified that City Heights had become suspicious in early 1996 about Mr. Wong's activities at the apartments. Its investigation led it to conclude that Mr. Wong had misappropriated significant sums of money from the owners. Mr. Wong was terminated February 15, 1996. Mr. Chu has calculated the loss to City Heights as being greater than \$25,000.

Mr. Chu presented a significant body of evidence in support of City Heights' allegations about Mr. Wong. Mr. Chu presented his evidence in a straight-forward and believable manner. However, the evidence which he adduced was evidence which, by his own candid admission, should have been put before the Director's Delegate. The Director's Delegate made repeated requests and demands for this information without success.

The Tribunal will not permit a party to refuse to participate in the initial processes before the Director and then appeal the Director's decision on the strength of information and documentation which could have been – but was not – produced to the Director. The following passage from the Tribunal's decision in *Tri-West Tractor Ltd. [1996] BC EST #D268/96* illustrates the Tribunal's approach:

“This Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the Act is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.”

City Heights' case on appeal “should have and could have been given to the delegate in the investigative process.” Mr. Chu agreed that he should have co-operated with the delegate. However, he found himself unable to cope with the situation when he discovered the magnitude of the loss. He testified that he took several months off from his law practice because of the stresses brought on by having to deal with the aftermath of Mr. Wong's employment. Once he got back to work at the end of August, 1996, he found that he was simply unable to get the large blocks of time necessary to sit down and go through the boxes of documentation. In addition, he could not bring himself to open the boxes and its instant reminders of the loss at the hands of Mr. Wong.

The Tribunal's policy admits exceptions. In *Freemart Financial Services Inc.*, BC EST #D104/97, the Tribunal said:

“The Tribunal will not permit a party to make excuses for its refusal to participate. We recognize, however, that not all parties are sufficiently organized or sophisticated to deal with Tribunal matters. Some latitude will be given the applicant and the respondent in these circumstances.”

Mr. Chu does not fit into the category of being poorly organized or unsophisticated. However, I found Mr. Chu to be a credible witness and I accept his testimony on this issue. Specifically, I accept that he was required to take a stress leave from his firm and accept that his stress reaction effectively prevented him from dealing with the requests for information being received from the delegate. This may explain the delay from April 1996 to the end of August. But it does not properly explain the failure of co-operation during the period from September 1996 to March 1997 during which City Heights continued to refuse the delegate's requests for information and documentation. That the events surrounding Mr. Wong's employment and its termination were traumatic for Mr. Chu is not in doubt. However, the failure to deal with the matter within the space of almost a full year, or to at least communicate the difficulties to the delegate, makes it impossible to hear City Heights' case on its merits and still uphold the Tribunal's policies.

I am compelled in these circumstances to dismiss the appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination of the Director's Delegate dated March 13, 1997 be confirmed.



John L. McConchie
Adjudicator
Employment Standards Tribunal