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 -

Ferdinand C. Pierre

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/640

DATE OF DECISION: September 22, 1997

DECISION

OVERVIEW

This is an appeal by Ferdinand C. Pierre, under Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination which was issued by a delegate of the Director of Employment Standards on July 28, 1997. The Determination resulted from a complaint by Mr. Pierre that his former employer, Dynamic Fab and Machine Ltd., ("Dynamic" or "the Employer"), had terminated his employment thereby giving him entitlement to compensation for length of service. The Director's delegate found that Dynamic did not owe Mr. Pierre compensation for length of service.

I have made this decision based on my review and analysis of the Determination and Mr. Pierre's appeal, including his reasons for appealing the Determination.

ISSUES TO BE DECIDED

Should the Determination be confirmed, varied or cancelled?

FACTS

Certain facts pertaining to this appeal are undisputed, as noted on page 2 of the Determination:

> The parties agree that you were laid off on August 14, 1996, recalled to work by the employer on September 23, 1996, and laid off again on October 16, 1996. You record an earlier layoff in April 1994 and, after three weeks, you were called back to work.

The Determination goes on to explain that Mr. Pierre's complaint was based on his allegation that Dynamic did not notify him to return to work after October 16, 1996 thereby terminating his employment and entitling him to compensation. It also notes that the Employer contended that it made several attempts to recall Mr. Pierre to work by way of telephone calls, telephone messages and sending messages via a co-worker/friend. In the absence of any response Dynamic concluded that Mr. Pierre had forfeited any right of recall, entitlement to notice or compensation in lieu of notice.

During his investigation, the Director's delegate received payment from Dynamic in the amount of $26.42 in full settlement of Mr. Pierre's claim for overtime wages.

The Determination sets out at length the findings made by the Director's delegate with respect to the efforts made by Dynamic to contact Mr. Pierre. Those findings were based on a written statement by Grant Polmanter (Plant/Project Manager) concerning his efforts

to contact Mr. Pierre by telephone as well as those made by Martin Bukta (Foreman) to contact Mr. Pierre. In addition the written statement describes how Sam Asiedu (co-worker/friend) was asked to contact Mr. Pierre to tell him to return to work. The Director's delegate confirmed with Mr. Asiedu his recollection of being asked by the Employer to contact Mr. Pierre concerning a recall to work.

The Director's delegate wrote to Mr. Pierre on May 7, 1997 to advise him that he had concluded that his employment had not been terminated by Dynamic and, therefore, he was not owed any compensation. Subsequently, Mr. Asiedu spoke to the Director's delegate to dispute certain statements attributed to him in the May 7th letter. The essence of Mr. Asiedu's observations were that any discussion he may have had with Mr. Pierre concerning a recall to work was likely to have occurred in September, 1996 rather than November, 1996.

In making the Determination, the Director's delegate gave the following reasons:

> Given the evidence before me and after re-examining the issues and receiving evidence from you and Mr. Asiedu, I arrive at the same conclusion as stated in my May 7 letter.
>
> I prefer the first evidence given by Mr. Asiedu at a period of time when he was not influenced by the employer or privy to influence from his friend and former co-worker. While appreciating the sensitivity of his position, the questions had to be asked in order to confirm the employer's position and to assist in determining whether the employer had done everything reasonably possible to contact you for recall to work.
>
> The *Act* and guidelines thereto are silent on the issue of written employer notice of recall to work, therefore, while a preferred method, it is not required by law. Given the previous successful layoffs and recalls purportedly using the same methods, it is more likely than not that you were contacted by declined for unspecified reasons.
>
> The employer's evidence is consistent and demonstrates a sense of fairness in recalling you work in September despite you apparent inflammatory comments to him in August.

In his appeal, Mr. Pierre states that the Determination is wrong because he was "...laid of a second time without any explanation on October 14, 1996." He also states that:

> The number one fact which is in dispute is from the beginning my main and only witness, Mr. Sam Asiedu was put in a strange situation by Mr. Smale by calling him at his work place, whereas he could have called him at his home.

ANALYSIS

This is an appeal under Section 112 of the *Act*. It is trite law that in an appeal the appellant (Mr. Pierre this case) bears the onus of proving its case. That is, in the circumstances of this appeal, Mr. Pierre bears the onus of establishing that the Determination ought to be varied or cancelled.

In *BWI Business World Incorporated* (BCEST #D 050/96) the Tribunal describes why the conduct of an investigation and the issuance of a determination by the Director's delegate is a quasi-judicial process:

> Once a complaint has been filed, the Director has both an investigative and an adjudicative role. When investigating a complaint, the Director is specifically directed to give the "person under investigation" (in virtually every case, the employer) "an opportunity to respond" (section 77). At the investigative stage, 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 the employee. In my view, the Director is acting in a quasi-judicial capacity when conducting investigations and making determinations under the Act [*cf. Re Downing and Graydon* 21 O.R. (2d) 292 (Ont.C.A.)].

Section 114(1)(c) of the *Act* allows the Tribunal to dismiss an appeal if it is "...frivolous, vexatious or trivial or is not brought in good faith." Black's Law Dictionary (6th edition) defines "frivolous" as:

> A pleading (which) is clearly insufficient on its face and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purpose of delay or to embarrass the opponent. A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense.

Similarly, a frivolous appeal is defined as "...one in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed."

When I review the Determination and Mr. Pierre's appeal, I find that this appeal is devoid of merit because he has not made any submission nor given any evidence which challenge or controvert the findings made by the Director's delegate in the Determination.

As noted above, Mr. Pierre bears the onus of proving his case. To have some prospect of meeting that onus he must present to the Tribunal some evidence or argument which challenges the material points in the Determination. I find that Mr. Pierre's assertion Mr.

Asiedu "...was put in a strange situation" by the enquiries which the Director's delegate made is not a sufficient ground on which to launch an appeal. Mr. Pierre offers no evidence to challenge the finding that he was "... recalled to work and for whatever reason declined to report" and, therefore, his employment was not terminated by Dynamic. Also, Mr. Pierre makes no submission or response which challenges the delegate's reasoning that "(T)he *Act* and guidelines thereto are silent on the issue of written employer notice of recall to work (and) while a preferred method, it is not required by law.

For all these reasons I dismiss the appeal under Section 114 of the *Act* as I find that it is a frivolous appeal.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC/sf