Employment Standards TRIBUNAL

An appeal

- by -

Hundial Holding Ltd. operating as Evergreen Pub
("Evergreen")

- 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: Ian Lawson

FILE No.: 2002/317

DATE OF HEARING: September 10, 2002

DATE OF DECISION: September 25, 2002

DECISION

APPEARANCES:

For the Appellant:	Jack S. Hundial, Sulakhan S. Hundial
The Respondent:	no appearance
For the Director of Employment Standards:	John Dafoe

OVERVIEW

This is an appeal by Hundial Holding Ltd. operating as Evergreen Pub ("Evergreen") pursuant to s. 112 of the *Employment Standards Act* ("Act"). The appeal is from a Determination issued by John Dafoe as a delegate of the Director of Employment Standards on February 28, 2002. The Determination found Evergreen liable to pay compensation for length of service plus vacation pay and interest to former employee Barry Johnson ("Johnson") in the total amount of $373.44. Evergreen was allowed an extension of time to file an appeal, and did so on April 8, 2002. An oral hearing was held at Terrace, B.C. on September 10, 2002.

FACTS

Evergreen operates a pub in Terrace and Johnson was employed there as a cook. Johnson complains that he had initially given two weeks' notice of quitting to Evergreen manager Jack Hundial, but Hundial asked him to reconsider his decision. The two were to discuss the matter at a later date. Before their discussion could take place, however, Johnson was dismissed. There is some confusion as to the reasons for the dismissal: on the one hand, he missed a shift and the replacement cook he had arranged failed to show up for work; on the other hand, the termination of Johnson's employment appears to have happened precisely 14 days after the day he gave two weeks' notice of quitting. There is no dispute, however, that Evergreen indicated on Johnson's Record of Employment form that he had been "dismissed."

Confusion arises as to the reasons for dismissal chiefly because Evergreen made no response to the Director's several requests for information. At the hearing, Evergreen agreed that on October 4, 2001 the Director's delegate made a written request for its response to Johnson's complaint, to which Evergreen failed to respond. It was further agreed that the Director's delegate met in person with manager Hundial in early November 2001, at which Hundial requested more time to respond to the complaint, and indicated the dismissal was related to Johnson's "attendance problems." The Director's delegate telephoned Hundial a few weeks later to remind him to respond to the complaint, and then sent another letter dated November 28, 2001 containing the words: "please forward as soon as possible a full written account of the events leading to the termination of Johnson's employment with the Pub." No response of any kind was made by Evergreen. The Director's delegate then issued his Determination three months later.

At the hearing of the appeal, Evergreen asked to present evidence that would support the dismissal. Much of the intended evidence is set out in a letter sent to Mr. Dafoe on March 6, 2002. Evergreen's letter, however, merely underscores the confusion alluded to above: Evergreen states that Johnson's last day of

employment was August 28, 2001 "based on his verbal notice of 2 weeks given to Jack Hundial, on the 14th of August." The letter then sets out circumstances that might support dismissal on the basis of Johnson's failure to show up for work on August 25, 2001.

These facts call for me to decide first whether the appellant has met the threshold test of demonstrating some error in the Determination, before being allowed to present new evidence on appeal that was not put before the Director's delegate.

ISSUE TO BE DECIDED

The issue in this appeal is whether Evergreen has demonstrated the Determination was sufficiently wrong in its conclusions of fact or law to justify the Tribunal exercising its authority under s. 115 of the Act to vary or cancel the Determination or refer it back to the Director.

ANALYSIS

Since its creation, the Tribunal has held that appeals before it are neither hearings *de novo*, nor appeals conducted solely on the record below (Re World Project Management Inc. [1996] BCEST # D325/96). One of the purposes of the Act is to provide fair and efficient procedures for resolving disputes over the application and interpretation of its provisions (s. 2(d)). The Tribunal has held it would be contrary to this purpose if every appeal were to be a hearing *de novo*. The lack of a proper record of proceedings before the Director, however, renders it difficult to for the Tribunal to restrict its appeals solely to the record below. The result is that an appellant bears the "risk of non-persuasion," and must first pass the threshold test of demonstrating some error in the Determination before being allowed to present evidence on an appeal.

The failure of an appellant to present evidence to the Director's delegate, when such evidence was available before the Determination was made, is a serious impediment to an appellant's ability to demonstrate an error of fact in the Determination. It is equally contrary to the purpose of the Act if appellants could sit in the weeds and hold evidence back from the Director's delegate, only to use it at an appeal. The Tribunal has consistently held it will normally not allow a party to present evidence on appeal which could have been presented at the investigative stage (see Tri-West Tractor Ltd. [1996] BCEST # D268/96, and Kaiser Stables Ltd. [1997] BCEST # D058/97).

An appellant's complete failure to respond to the Director's delegate at the investigative stage is the clearest possible circumstance in which the Tribunal will refuse to hear new evidence on appeal. It is neither fair nor efficient for the Tribunal to allow appeals in those circumstances, and so I ruled at the hearing that Evergreen could not present any evidence in support of its appeal. All of the evidence Evergreen hoped to present was available at the investigative stage. Indeed, as the Director's delegate pointed out at the hearing, the facts which were at the heart of the investigation must have been known to Evergreen, because it decided to dismiss Johnson in the first place.

I heard submissions from Evergreen as to whether any error could be found in the Determination that might support the appeal. Evergreen could not demonstrate any mistake or unfairness in the Determination, and Evergreen's argument returned ineluctably to its own failure to respond to the Director's delegate. I reviewed Johnson's initial complaint containing a detailed statement of facts, and I

find no error in the Determination based on those facts as alleged by Johnson and as investigated by Mr. Dafoe.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by Mr. Dafoe is correct and the appeal should be dismissed. Pursuant to section 115 of the Act, I order that the Determination dated February 28, 2002 be confirmed, with interest pursuant to section 88 of the Act.

____

Ian Lawson
Adjudicator
Employment Standards Tribunal