

**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 -

Famous Players Inc.  
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE NO.:** 1999/536

**DECISION DATE:** November 5, 1999

**DECISION**

**APPEARANCES/SUBMISSIONS**

Mr. Michael Hunter on behalf of the Employer

Mr. Glen Smale on behalf of the Director of Employment Standards

**OVERVIEW**

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued on August 27, 1999 which found that Ms. Lana Cho (“Cho”) was entitled to \$1,405.90 on account of compensation for length of service.

**ISSUE TO BE DECIDED**

The Employer disputes the Determination on ground that the delegate did not make reasonable efforts to give the Employer an opportunity to respond and denied it a fair hearing in accordance with the principles of natural justice. The delegate disputes this and says that the Employer refused to participate in the investigation.

**FACTS AND ANALYSIS**

From the Determination, I understand that Cho filed a complaint with the Employment Standards Branch (the “Branch”) that she was not given two weeks’ notice of her termination or pay in lieu thereof. Apparently, Cho, who was employed by the Employer between March 7, 1997 and February 17, 1999 as a theatre manager, was terminated following a three weeks vacation. She claimed that she had informed the Employer of her vacation plans and obtained its permission. When she did return, the Employer considered that she had abandoned her position.

In the Determination, the delegate observed that the Employer refused to participate in the investigation. The delegate set out his contacts with the Employer as follows:

- “i) July 14, 1999 - Delegate left a detailed telephone message with Susan Del Medico, Human Resources, in Toronto regarding the allegations, role of officer from the Ministry of Labour in British Columbia and requesting a call back. Time left - 10:12 a.m. on voice mail.
- ii) July 20, 1999 - 1:25 p.m. - Delegate phoned Susann Del Medico and spoke to her regarding the complaint. She apparently turned the matter over to David Poiny, Vice President, Western Operations and

he was to call me. Ms. Del Medico thought this matter had already been resolved and said this sound like round 2.

iii) July 26, 1999 - 10:55 a.m. - called 926-0241, Mr. Poiny's phone number received from Ms. Del Medico, to find that it was no longer in service.

iv) July 26, 1999 - 11:00 a.m. - phoned Susan Del Medico in Toronto and left a message stating that Mr. Poiny hadn't contacted the delegate, the phone number was out of service and that I needed the employer's position in this matter or I would proceed on the basis of the evidence received to date.

v) July 29, 1999 - Ms. Del Medico returned the above message and gave me another phone number for Mr. Poiny.

vi) August 3, 1999 - 10:18 a.m. - Phoned David Poiny, clarified the allegations and approximate cost of same, what the officer's role from the Ministry of Labour was and that I require a response from the employer. He stated that he thought someone called from Employment Standards called 8 weeks previous. He was told that no file notes show such a contact being made. Mr. Poiny stated that he would review the file and get back to me within the week.

vii) August 12, 1999 - 9:05 a.m. - Phoned Mr. Poiny and was told by female employee that he had just started 3 weeks' vacation. The officer told the staff member that the Branch was getting the run around and that if no response was received, I would be ordering them to pay based on the evidence received to date. She promised to contact Toronto and someone would get back to me.

viii) August 13, 1999 - 9:31 a.m. - Female employee called to say that Mark Smaal was to have called me yesterday. The officer told the employer that the time for input had expired and that a determination would be written stating that the employer declined to participate in the investigation.

ix) August 13, 1999 - 2:19 p.m. - Mark Smaal left a telephone message stating who he was and that he would try to contact me again."

On August 27, 1999, the delegate issued a Determination based on information received by Cho. (While the Employer disputes this information, and states that "all of the facts" are in dispute, it does not set what the facts--from its point of view--are).

As mentioned above, the Employer argues that the Determination is wrong because the delegate did not make reasonable efforts to contact it. The Employer's argument boils down to the following:

- 1) The dismissal occurred on February 17, 1999 and the delegate did not contact

the Employer until July 14, 1999. The delegate gave the Employer 30 days to respond and when it sought to do so, informed it that the time to respond had expired. The decision to terminate the Employer's rights to respond was arbitrary and unreasonable.

- 2) The delegate should have dealt with the Employer's office in B.C.
- 3) At the material time, the Employer's B.C. office was being moved and fax and telephone numbers were being changed. The delegate did not communicate in writing but relied on voice mail.
- 4) The Employer was involved in a high profile labour dispute and such that all of the energies of management are being overtaxed attempting to run a business behind picket lines". As well, the delegate was aware that Mr. Poiny had gone on vacation and, presumably, in the circumstances, should have extended the time to respond.

The delegate responds at great length to the Employer's submission.

In my view, the material facts, with respect to the issue of whether the Employer was denied a fair hearing, set out in the Determination, are not in dispute. The Branch received a complaint. The delegate contacted the Employer and informed it of the particulars of the matter. The delegate contacted the Employer's Toronto address set out in the complaint and, as well, in the Record of Employment. This form provided that "further information" could be obtained from Susan Del Medico, Human Resources Manager with the Employer. When the delegate was informed that the matter had been turned over to Mr. Poiny, of the B.C. office, the delegate attempted to contact him and, in fact, actually made contact. I understand from the Determination, quoted above, that Mr. Poiny promised to "get back to <Smale> within the week". While, I agree that there are merits to communicating in writing, there is, in my view, no statutory requirement to do so. Section 77 requires that the delegate "must make reasonable efforts to give a person under investigation an opportunity to respond". In this case, there is no issue that the contacts stated by the delegate to have taken place, actually took place. Obviously, while it is desirable that the director acts expeditiously in relation to a complaint, the appellant is not arguing that there is any prejudice flowing from the delay of some five months from when the complaint was filed and until the Employer was contacted. In any event, the argument goes to the issue of whether the delegate should have extended the time for responding. In my view, giving the Employer 30 days to respond is not unreasonable. The Employer did not request an extension of time which, as stated in the appeal, is often granted. Despite having promised the delegate that a response would be forthcoming, Mr. Poiny went on vacation without having done so or requested an extension of time. While I can appreciate that the Employer's management personnel has been otherwise occupied, that is not relevant for the present purposes. In this case, the Employer was warned (on July 26, 1999) that a decision would be made based on Cho's information unless the Employer responded. Even after being told that the decision would be based on Cho's information on August 13, the Employer did not seek to contact the delegate (apart from a message from Mr. Smaal

that he would try to contact the delegate again--which, apparently, he did not do). In the circumstances, I am of the view, that the delegate made "reasonable efforts" to obtain the Employer's position with respect to the complaint.

I agree with my colleagues in *Kaiser Stables*, BCEST #D058/97, and numerous other cases, that the Tribunal will not generally allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination. The Employer now seeks to question the conclusion that Cho was terminated without just cause and her entitlement to compensation for length of service. These matters could have been addressed during the investigation. In my view, the Employer refused to participate in the investigation and, in the result, the appeal must fail.

**ORDER**

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated August 27, 1999 be confirmed.

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**Ib Skov Petersen**  
Adjudicator  
Employment Standards Tribunal