

**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 -

Cineplex Odeon Corporation  
("Cineplex Odeon")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**Adjudicator:** Hans Suhr

**File No.:** 97/514

**Date of Hearing:** December 5, 1997

**Date of Decision:** December 19, 1997

**DECISION**

**APPEARANCES**

Irwin Cohen	on behalf of Cineplex Odeon Corporation
George Mah	on behalf of Cineplex Odeon Corporation
Larry Page	counsel for Cineplex Odeon Corporation
Carol Maxwell	on her own behalf
Grace Dumonceaux	on her own behalf
Kathleen Penner	on her own behalf
Herb Maxwell	counsel for Carol Maxwell, Grace Dumonceaux and Kathleen Penner

**OVERVIEW**

This is an appeal by Cineplex Odeon Corporation (“Cineplex Odeon”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated June 16, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Cineplex Odeon alleges that the delegate of the Director erred in the Determination by concluding that Carol Maxwell (“Maxwell”), Grace Dumonceaux (“Dumonceaux”) and Kathleen Penner (“Penner”) were entitled to compensation for length of service. The Director’s delegate concluded that compensation for length of service in the total amount of \$10,453.22 was owing to the three former employees.

Counsel for Cineplex Odeon raises the issue that they did not receive an opportunity to provide all the information to the Director prior to the Determination being issued and therefore, Cineplex Odeon was denied a “fair hearing”. Counsel for Cineplex Odeon further submits that the Director did not provide them with copies of information provided by the former employees resulting in Cineplex Odeon not having the opportunity to reply to the allegations contained in the submissions. Counsel for Cineplex Odeon finally submits that the Director, in the Determination, relied upon information that was not made available to Cineplex Odeon for their reply.

**ISSUE TO BE DECIDED**

The issue to be decided is whether Cineplex Odeon was given a reasonable opportunity, pursuant to Section 77 of the *Act*, to respond prior to the Determination being issued.

## FACTS

Maxwell, Dumonceaux and Penner ceased employment with Cineplex Odeon on July 26, 1994.

Maxwell, Dumonceaux and Penner filed complaints with the Employment Standards Branch on or about **September 24, 1994**, alleging that they were entitled to compensation for length of service from Cineplex Odeon.

The Director advised Cineplex Odeon by letter dated **July 19, 1995**, that complaints had been received from the former employees.

Counsel for Cineplex Odeon provided an initial response to the Director by letter dated **August 10, 1995**.

The Director wrote to Cineplex Odeon on **November 19, 1996** advising that the former employees had provided a rebuttal to the position of Cineplex Odeon provided August 10, 1995. That letter states in part;

“Approximately 15 months ago, we last communicated about the ...complaints..... I have attached a copy of Mrs. Maxwell’s letter dated August 19, 1996, in which she summarizes her arguments.

If Mrs. Maxwell’s arguments influence the employer to change their position regarding the complaints, you may contact me to discuss your client’s instructions about settlement of the dispute. Otherwise, if Cineplex Odeon still maintains the complainants quit their respective jobs, or **I have not heard back from you by Dec. 20, 1996, I will write a Determination** based on information provided by yourself and the complainants.”

Counsel for Cineplex Odeon and the Director agreed to an extension until January 17, 1997 for their reply.

Counsel for Cineplex Odeon submitted their reply to the Director by letter dated **January 17, 1997**.

The Director, by letter dated **May 8, 1997**, to Cineplex Odeon requests certain specific evidence be provided. This letter states in part;

“...So far, I have heard the employee’s and employer’s arguments but have not seen any evidence (proof) to substantiate just cause or that the

employees were on notice that continued disobedience would result in their termination. Assuming such evidence exists, I would like to take it into account before making any decisions about this complaint. Consequently, I request you provide me whatever evidence you feel is pertinent (*the Director lists examples of certain evidence to be supplied*).....I will contact you to discuss my findings once I review the evidence you provide, otherwise, in the absence of any further submissions from you, I will decide the merits of each parties arguments based on information I already have.”

The Director concluded that compensation for length of service was owed to the three former employees and issued the Determination on **June 16, 1997**. The Director states in the Determination on the bottom of page 7 and top of page 8 that:

“The complainants provided two detailed written rebuttals in response to the employer’s written account of why they had just cause for dismissal. The employer was invited to provide to the Officer, any evidence they had supporting their allegations, which would be considered before a determination is reached respecting the issue of whether the employer had “just cause”, or the complainants simply resigned under the crushing weight of evidence of wrong-doing.

The employer failed to avail themselves of the opportunity to provide any real evidence whatsoever, either to the investigating officer or the complainants, other than the anecdotal summary of the allegations. The employer must prove cause on the balance of probability based on a finding of real incompetence or misconduct rather than a simple dissatisfaction with performance or concern as to potential misconduct. (Busby v. Brink [1989], 16 A.W.C.S. {3D} 324 9 BB.C.S.C. ) Since the onus is on the employer to prove they had just cause and because they have presented no evidence supporting their position. I accept the complainant’s .....

## ANALYSIS

The “quasi-judicial” capacity of the Director when conducting investigations and making determinations was set forth in a decision of the Tribunal ( *BWI Business World Incorporated*) BC EST No. D050/96, Thornicroft. Once a complaint has been filed, the Director has both an investigative and adjudicative role. When investigating a complaint, the Director is specifically directed to give the “person under investigation” , in this case Cineplex Odeon, “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 employees.

Section 77 of the *Act* states:

“*Section 77, Opportunity to respond*

*77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.”*

The evidence from the file reveals that the time period from the filing of a complaint until the issuance of a Determination spanned some 30 months.

The evidence further reveals that the letter from the Director dated May 8, 1997 which requests specific evidence from Cineplex Odeon, does not stipulate a deadline for the response.

The evidence further reveals that the second submission to the Director from the three former employees was not provided to Cineplex Odeon for their response.

The actions of the Director with respect to this matter has not afforded the “person under investigation”, Cineplex Odeon, a reasonable opportunity to respond to the allegations and information provided by the former employees. Furthermore, the failure of the Director to provide Cineplex Odeon the second submission from the former employees and thereby denying them the opportunity to respond to information which subsequently formed part of the basis of the Determination is, in my view, a denial of natural justice.

Based on the evidence provided, I conclude that the Director failed to provide a reasonable opportunity after May 8, 1997 for Cineplex Odeon to respond to the request for specific evidence.

Section 115 of the *Act* permits the Tribunal to refer a matter back to the Director for further investigation and, in the circumstances of this matter, I conclude that a referral back to the Director would be most appropriate.

I am also cognizant of the inordinate amount of time that this matter has taken to this date and, as I do not wish to unduly delay the process further, therefore, I will also include instructions to the Director that the investigation be concluded no later than January 15, 1998.

The parties are also advised that the hearing is to be reconvened at 9:00 a.m. on January 30, 1998 at a place to be arranged by the Tribunal and communicated to the parties.

Counsel for Cineplex Odeon was to advise the Tribunal by December 10, 1997, if the date of January 30, 1998 posed a conflict in scheduling. No communications were received from counsel for Cineplex Odeon.

For all of the above reasons, I conclude that the appeal of Cineplex Odeon is granted to the extent as set forth above.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 16, 1997 be referred back to the Director with the following instructions:

1. The investigation is to be concluded no later than January 15, 1998.
2. If the investigation results in a conclusion that the original Determination was appropriately issued, the parties are to be so advised by fax or in person, whichever is the quickest manner.
3. Should the investigation result in a new Determination being issued, both parties are to be served with the new Determination by fax or in person, whichever is the quickest manner.
4. In the event that a new Determination is issued, both parties are to be advised of their respective right to appeal.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**