

An appeal

- by -

The Taiga Works Wilderness Equipment Ltd.
(“Taiga”)

- 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 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2008A/82

DATE OF DECISION: September 30, 2008

DECISION

SUBMISSIONS

Lindsie Thompson

counsel for Taiga

Andres Barker

on behalf of the Director of Employment Standards

OVERVIEW

1. Taiga Works Wilderness Equipment Ltd., (“Taiga”), appealed a Determination of the Director of Employment Standards (“the Director”) issued September 28, 2007.
2. Taiga argued that the delegate erred in finding that the complainants’ conditions of employment were substantially altered and that the delegate failed to observe the principles of natural justice in making the Determination.
3. In a decision issued February 6, 2008 (BC EST #D016/08), I concluded that the delegate had not erred in her Determination that Taiga had terminated the complainants’ employment by substantially altering their conditions of employment.
4. I found that the delegate did not disclose all relevant information to Taiga to enable it to fully respond and that she did not consider Taiga’s final submission in its response to the alleged breaches of the *Employment Standards Act* (“the Act”). Nonetheless, I determined, after a review and consideration of the documents on appeal, it was unnecessary to remit the matter back to the delegate for reconsideration on that issue. I found that any breaches of natural justice could be cured on appeal and having reviewed the submissions, determined that any procedural defects had been addressed. Taiga sought reconsideration of my decision, contending that I had erred in law in failing to order a new hearing on the complaints after concluding that the Director had failed to observe the principles of natural justice.
5. In allowing the reconsideration application (BC EST #D066/08), the Tribunal said:

In at least one respect, the position of Taiga in this application is ingenuous, as I am not entirely convinced there was no opportunity to make submissions relating to the material which was made available to Taiga for the first time during the appeal process. Taiga had the opportunity to make submissions on all of the materials in the Section 112 record in the context of other arguments raised in the appeal. Taiga did, in fact, make specific submissions on some of that material. The failure of Taiga to make more comprehensive submissions on that material cannot be totally laid at the feet of the (sic) either the Director or the Tribunal Member of the original decision.

...

It is unclear in the December 20, 2007 submission made by Taiga what documents, among those that were not disclosed during the complaint process, were considered by Taiga to be relevant to the sole legal issue in the Determination and the original decision, which is whether, the complaints employment with Taiga was terminated and, as a result of that termination, the entitled to length of service compensation under the *Act*. (sic)

It is equally unclear in this reconsideration application what relevance any of the undisclosed material can possibly have on the entitlement of the complainants under the *Act*.

6. In allowing the reconsideration application, the member found that it was not entirely clear that Taiga had been given the opportunity to reply in respect of documents first provided during the appeal process. The member concluded that procedural fairness could be ensured by referring the matter back and “providing Taiga with an opportunity to make a complete submission in respect of previously undisclosed documents”. The member directed that:

The submission must clearly identify which documents were not in the possession of Taiga prior to their receipt as part of the Section 112 record, of those documents, which parts are disputed, on what basis they are being disputed and the relevance of those disputed areas to the question decided by the Director in the Determination.

SUBMISSIONS AND ARGUMENT

7. In its submission Taiga identifies the documents not disclosed by the Director prior to their receipt of the section 112(5) record:
- The Board of Referee decisions
 - For some employees, pay stubs and cheque stubs
 - The umpire decision
 - T-4's
 - Undated, hand written statements made by some employees stating “I reluctantly accepted these terms and signed this document upon employer request”
 - For some employees, hand written statements setting out their name, SIN and overtime hours per week
 - For some employees, hand written statements setting out regular working hours
 - Hand written documents written in Cantonese or Mandarin, content unknown
 - For some employees, hand written piece work records
 - Photocopy of advertising for a production manager
 - Hand written notes relating to rates, regular hours, overtime, cleaning, piece rate and production manager vacancy
 - Computer generated and hand written notes about piece work records
 - Typed notes concerning breaks

- For some employees, submissions and memorandums to the Board of Referees regarding “breaks” and “supplementary Information to be considered”
 - For one employee, a hand written letter “to whom it may concern re Taiga works”
 - For some employees, undated one page of notes entitled “unfair labour standard practice” and “unfair wage practice/see attached pay stub”
 - For one employee, a submission to EI and response to Taiga’s response
 - For one employee, a one page note re “responses” with five numbered points
 - a memorandum re “reduction in per piece pay” and
 - a memorandum re washroom cleaning
8. Taiga acknowledges that it had copies of some of these documents, such as payroll information and employer submissions, through other means and takes no issue with the delegate not disclosing those. It does take issue with documents never disclosed to Taiga but which Taiga had access to through its participation in the employees’ EI claims.
9. Taiga says that the delegate’s failure to disclose these documents as well as the employees’ submissions in respect of these documents deprived Taiga of the opportunity to know the arguments being considered by the delegate and respond to them. Taiga says that not only did the delegate fail to provide the material but refused to disclose them when Taiga expressly asked her to. Taiga says that while the delegate appeared to believe that it was sufficient to advise it that she was considering the employees’ submissions and Taiga’s responses which had been filed in the EI hearing, the delegate’s conduct amounted to a serious breach of natural justice for several reasons which include the fact that Taiga was not in a position to know whether the delegate actually had all the EI materials before her. Taiga submits that the delegate’s failure to refer to its responses suggests that the delegate did not consider a large part of its EI submissions.
10. Taiga also submits that it was improper for the delegate to rely on submissions made in EI proceedings in determining a complaint under the *Act* without asking the parties to advise how those submissions were relevant to the employees’ complaints under the *Act*.
11. Taiga contends that the nature of many of the undisclosed documents makes it impossible for the breach to be cured simply by the Tribunal reviewing the documents because the vast majority of the documents are payroll records and cryptic notes which are not self explanatory. Taiga further submits that it is still not in a position to know how many of the documents were relied upon by the delegate and what submissions were made in respect of them. This is because, for example, a) some of the documents were written in Cantonese or Mandarin, b) it has not been advised as to how the employees relied on the paystubs, piece rate records or hand written notes, c) it has not been advised what significance the delegate placed on a September 8, 2004 memorandum and accompanying undated hand written statement, or d) what reliance the employees placed on the EI decisions.

12. Taiga says that because the delegate failed to advise it of the significance of or reliance placed on these documents, it is unable to provide submissions in response to those documents. In these circumstances, Taiga asserts, the Tribunal cannot cure the breach by simply reviewing those documents.
13. Taiga also identifies several documents it asserts the delegate had in her possession that Taiga had never seen before. Those are:
 - two pages of a four page submission by one employee in relation to the denial of her claim for EI;
 - two additional documents apparently authored by an employee regarding reductions in per piece pay and “responses”;
 - a document relating to wages earned by an employee during one particular pay period and a note on that document alleging insufficient payment by Taiga; and
 - an undated letter apparently to the delegate from the employees written in Mandarin.
14. Taiga argues that, with respect to the first document, the delegate clearly considered the employee’s submissions and failed to take into account Taiga’s objections to and disagreement with that document. It says that had the delegate done so, the claims could have properly been refuted. With respect to the second document, Taiga submits that the piece rate was in accordance with standard practice in the industry and that the total pay per garment stayed the same. With respect to the third document, Taiga submits that it is impossible to respond to this document since it is not clear who authorized it nor what the statements represent. With respect to the fourth document, Taiga submits that while it appears that the employee contends she was not paid holiday pay, that issue was not before the delegate and denies, in any event, that the employee was owed holiday pay. With respect to the fifth document, Taiga says that the document had not been translated for any party. Taiga says that it has obtained an unofficial translation and that it contains erroneous statements about how the proposed new system might affect the employees. Taiga says it disputes these allegations and submits they are not supported by the evidence.
15. Taiga submits that the delegate failed to adhere to the principles of natural justice and denied it a fair hearing by failing to disclose documents to Taiga upon which she relied in making her Determination. Taiga asserts that it is not possible to cure the breach of natural justice without a fresh hearing into the employees’ complaints and seeks to have the Determination cancelled.
16. The Director submits that in considering whether there was a breach of natural justice through not disclosing certain documents, I should consider whether the documents were actually relied upon by the delegate. The Director argues that the delegate specifically addressed Taiga’s concerns about the EI appeal decisions. The Director notes that the delegate expressly indicated that the EI Umpire’s decision was based on another statutory regime and indicated that she would apply the appropriate tests under the *Act* to the evidence before her. The Director argues that the undisclosed documents had no bearing on the delegate’s decision and that there is, therefore, no need for a rehearing of the merits of the complaints.
17. The Director further asserts that Taiga has not complied with the Tribunal’s instructions to explain the relevance of the undisclosed documents. The Director says that it is insufficient for Taiga to simply say that it cannot respond without knowing what reliance the delegate placed on them. The Director also contends that many of Taiga’s arguments are no different than those already addressed by the delegate in the Determination and that rearguing the points already made would not affect the outcome.

18. In reply, Taiga contends that it is impossible to determine which of the undisclosed documents the delegate did rely on in reaching her Determination and that it is therefore impossible to ask the Tribunal to speculate as to which ones she did rely upon.
19. Taiga argues that the Director's submissions are in conflict with the Supreme Court of Canada's decision in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 where the court stated that the conclusion as to whether a party has been denied a fair hearing cannot rest on whether or not it appears to the reviewing court that the hearing would likely have resulted in a different conclusion.
20. Taiga says that many of the documents that were not disclosed are not self explanatory and as a result it is impossible for it to determine whether it disputes those documents and whether they are relevant to the material issue.
21. Finally, Taiga also says that even though it had access to certain documents (such as the Board of Referees decisions) that were not disclosed, the delegate did not advise it what reliance she was placing on them in the context of the complaints before her. It contends that it still does not know what submissions the employees made in respect of these documents and cannot respond to them.

ANALYSIS

22. The central issue before the delegate was whether Taiga had terminated the complainants' employment by substantially altering their conditions of employment.
23. Section 76 of the *Act* requires the delegate to accept and review complaints, and section 76(3) permits a delegate to investigate or adjudicate complaints. Section 77 provides that, if an investigation is conducted, the delegate must "make reasonable efforts to give a person under investigation an opportunity to respond". Section 77 is thus a legislated, minimum procedural fairness requirement. It is consistent with the purposes of the *Act* "to promote the fair treatment of employees and employers" and "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*" (sections 2(b) and (d) of the *Act*). While section 77 does not require a formal adjudicative hearing, a person subject to adverse finding must be given adequate notice of the case he or she has to meet and an opportunity to respond. (*JC Creations Ltd. o/a Heavenly Bodies Sport* (BC EST #RD317/03))
24. In *Cyberc.Com AD & Host Services inc. operating 108 Tempo and La Pizzaria*, BC EST #RD 344/02), the Tribunal said:
- While section 77 does not require the production of the whole of the investigative file prior to issuing the determination and is not intended to allow for a form of "discovery", the delegate must make meaningful disclosure of the details of the complaints in order to make the opportunity to respond reasonable and effective.
25. *Cyberc.Com* was issued prior to an amendment to the *Act* which required the Director to provide the Tribunal with the record that was before the Director at the time the determination was made, including any witness statements and documents considered by the Director (s. 112(5)). However, *JC Creations Ltd.* which was issued after the amendment indicates that the requirement to provide the record does not change the law with respect to what the delegates are required to give the parties in order to meet the section 77 disclosure obligation. In particular, section 112(5) does not create a requirement that every

document that was before the Director be provided to the parties or that the party must be given an opportunity to respond to every such document. In *JC Creations Ltd.*, the Tribunal stated:

While it was not unfair for the delegate, during an investigation, to make separate contact with the Complainant to receive documents from her and get her side of the story in full without the Employer present, the Delegate was under a Section 77 duty of fairness to the employer to put the key elements of the employee's complaint to the Employer so that the Employer could respond.

26. In *JC Creations Ltd.*, the Tribunal found that the delegate had not complied with the section 77 duty because “the Employer, verbally or otherwise, was not made aware of the key points or representation that arose in the communications between the Delegate and the Complainant”.
27. Thus, the delegate has a duty to provide the employer with the complainant's “key elements” or “key points or representations” so that the employer can respond to those key matters on which the decision is likely to turn. There is no duty to provide every document before the delegate to the parties.
28. Taiga does not complain that the delegate failed to consider relevant documents it provided. Rather, it complains that it did not have an opportunity to respond to documents which came before the delegate either from the complainants or during the course of the investigation but which were not disclosed to Taiga.
29. Taiga complains that the failure to disclose these documents constituted a breach of procedural fairness. However, as indicated above, section 77 does not require the delegate to disclose to the parties all documents she has before her. The failure to disclose certain documents can only be a breach if Taiga can establish that the undisclosed documents contained “key” evidence or representations upon which the delegate relied in making the Determination adverse to Taiga on the central issue before it and that Taiga was not given any other opportunity, verbally or otherwise, to respond to that key evidence or those representations.
30. In remitting the matter back to me, the Reconsideration Decision directed Taiga to “clearly identify which documents were not in [its] possession prior to its receipt of the Section 112 record and of those documents, which parts are disputed, on what basis they are being disputed and the relevance of those disputed areas to the question decided by the Director in the Determination”.
31. Taiga has identified which documents were not in its possession prior to receipt of the section 112(5) record. However, it has not identified the relevance of the disputed parts of those documents to the central issue before the delegate. Taiga submits that some of the documents are not self-explanatory, and it is not in a position to know which documents the Delegate relied on in making the Determination. However, I find that, unless Taiga can identify key evidence or representations in the documents to which it should have been given an opportunity to respond but was not, no breach of the section 77 duty of fairness is established. Taiga has not identified such key evidence or representations in the undisclosed documents. To the extent that there is any evidence which might be considered relevant to that issue, it is not key evidence or representation. Accordingly, I find no unfairness to Taiga in the fact that these documents were not disclosed by the Delegate during the investigation.

ORDER

- ^{32.} I Order, pursuant to Section 115 of the *Act*, that the September 28, 2007 Determination, as revised on March 26, 2008, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal