

An appeal

- by -

467794 B.C. Ltd. operating as The Rage Nightclub

- 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: John M. Orr

FILE No.: 2003A/276

DATE OF DECISION: December 16, 2003

DECISION

SUBMISSIONS

Rob Moore	on behalf of 467794 B.C. Ltd. operating as The Rage Nightclub
Brodie Pountney	on her own behalf
J. Paul Harvey	on behalf of the Director

OVERVIEW

This is an appeal by 467794 B.C. Ltd (“the Company”) operating as “The Rage” nightclub pursuant to Section 112 of the Employment Standards Act (the “*Act*”) from a Determination dated September 3, 2003 by the Director of Employment Standards (the “Director”).

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

The Director determined that the Company owed \$466.85 in wages to a former employee, Ms. Brodie Pountney (“Pountney”), based on her evidence and submissions. Despite several attempts by Pountney and a delegate of the Director to communicate with the Company, the Company failed to respond at any time during the investigation of the complaint.

Having been served with the Determination the Company has appealed on several grounds including that the business had closed due to unforeseen circumstances [section 65 (1)(d)], that the employee was not entitled to compensation for length of service under Section 63 because of the application of Section 65 (1)(a)(i) as she was a temporary employee on a “call-in” basis and that one of the alleged work sites was not owned or operated by the Company. The Company also disputes the length of employment and hours claimed by Ms. Pountney. The Company claims that it was not aware of the case until served with the Determination.

ISSUE

The Company has raised several issues in this case including that the business had closed due to unforeseen circumstances [section 65 (1)(d)], that the employee was not entitled to compensation for length of service under Section 63 because of the application of Section 65 (1)(a)(i) as she was a temporary employee on a “call-in” basis and that one of the alleged work sites was not owned or operated by the Company. The Company also disputes the length of employment and hours claimed by Ms. Pountney. The Director’s delegate responds to those issues but also submits that the Company should not be allowed to appeal the Determination because the Company failed to participate in the investigation.

ARGUMENT

The Company submits that it was not given an opportunity to respond to the complaint and that the delegate made an error in law in not applying the provisions of Section 65 of the Act, which qualify and restrict the application of the severance provisions of Section 63. The Company also wishes to lead new evidence in relation to the hours of work claimed by Pountney.

The delegate submits that all reasonable efforts were made to give notice to the Company but that the Company failed to respond or participate in any way during the investigation of the complaint.

Ms. Pountney disputes the Company's allegations in relation to her length of employment and hours of work.

ANALYSIS

I have considered the submissions by the Company, the employee and the delegate for the Director in this appeal and have concluded that the appeal should be dismissed for the reasons submitted by the Director's delegate.

I agree that the Company raises some potentially valid issues in relation to the failure of the delegate to consider the application of Section 65. However, all of these arguments should have been submitted to the delegate during the investigation of the complaint. It ill behoves the Company to rely on these matters when the Company failed to respond in any manner to the employee or the delegate.

I accept the delegate's undisputed information that Ms. Pountney had prepared a "Self-help Kit" and mailed it to the Company on February 25, 2003. This is a process required of employees in attempting to resolve complaints at an early stage. Ms. Pountney mailed the Kit to the Company's address at 5113 Inman Avenue.

It is significant that Mr. Rob Moore gives this as his current address in filing the appeal. It is apparent that 5113 Inman Avenue was and remains a proper address for contacting the Company. No explanation is given by or on behalf of the Company for the allegation that Mr. Moore was unaware of the complaint until he received the Determination by registered mail at this very same address.

Subsequent to the attempt by the employee to contact the Company, the delegate sent a letter on April 28, 2003 addressed to the Company, Mr. Moore and other principals of the business to the address at 5113 Inman Avenue. The delegate also phoned a cell phone number for Mr. Moore and left a message for him. There was no response to either the letter or the phone call.

The delegate performed a corporate records search and found that the sole director and officer of the Company was Ravinder Singh Moore. On May 26, 2003 the delegate wrote to Ravinder Singh Moore at the address registered for Ravinder Singh Moore. On June 17, 2003 the delegate telephoned the listed home phone number for Ravinder Singh Moore and again left a message but again received no response.

It is evident that the delegate made reasonable efforts to give the Company every opportunity to respond to the complaint before the Determination was issued. Again it is noted that the Company has offered no explanation for its failure to respond.

It is a principle, established by the Tribunal since 1996 and consistently followed, that the employer is not entitled to “sit in the weeds”, failing to cooperate with the Director’s delegate, and then later file an appeal based on matters that could easily have been submitted at the time: *Re: Tri-West Tractor Ltd* [1996] BCEST #D268/96 and *Re: Kaiser Stables Ltd.* [1997] BCEST #D058/97. While this is not an absolute rule and certain exceptions have developed, in this case the Company has not provided any explanations for its failure to cooperate with the delegate.

Accordingly, I conclude that the Company cannot be permitted to raise the issues set out in the appeal and the appeal must be dismissed. Because of this conclusion, I have not addressed the actual merits of the grounds raised in the appeal in relation to the application of Section 65 and this decision should not be considered as making any negative comment on the merits of those submissions.

ORDER

I order, under section 115 of the *Act*, that the Determination herein dated September 3, 2003 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal