

Citation: Marina's Taverna and Pizza Ltd. (Re)
2018 BCEST 59

An appeal

- by -

Marina's Taverna and Pizza Ltd.
("Marina's")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts

FILE NO.: 2018A/38

DATE OF DECISION: May 29, 2018

DECISION

SUBMISSIONS

Selvakumaran Ratnam on behalf of Marina's Taverna and Pizza Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "ESA"), Marina's Taverna and Pizza Ltd. ("Marina's") has filed an appeal of a Determination issued by the Director of Employment Standards (the "Director") on February 23, 2018 (the "Determination").
2. On January 17, 2018, Athanasios Giouroukas ("Mr. Giouroukas") and Eleni Koukoutselou ("Ms. Koukoutselou"), (collectively, the "Employees") filed complaints with the Director alleging that Marina's contravened the ESA in failing to pay them regular wages and overtime.
3. Following an investigation, a delegate of the Director concluded that Marina's had contravened sections 63, 18, 40, and 45 of the ESA in failing to pay the Employees regular and overtime wages, statutory holiday pay, annual vacation pay, and compensation for length of service. The delegate ordered Marina's to pay \$6,514.22 in respect of those wages.
4. The delegate also imposed five administrative penalties on Marina's for the contraventions in the total amount of \$2,500, for a total amount payable of \$9,014.22.
5. Marina's contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination. Marina's also contends that evidence has become available that was not available at the time the Determination was being made.
6. These reasons are based on Marina's written submissions, the section 112(5) "record" that was before the delegate at the time the decision was made, and the Reasons for the Determination.

ISSUE

7. Whether or not Marina's has established any basis to interfere with the Director's Determination.

FACTS

8. The facts, as set out by the Director's delegate, are as follows.
9. Marina's was incorporated in January 2014 by Diane and Evdoxios Prodromou (the "Prodromous"). The Prodromous sold the assets, shares, and business to Selvakumaran Ratnam ("Mr. Ratnam") and his spouse, Sivakala Chandrakumaran ("Ms. Chandrakumaran"), and resigned as Directors and Officers of Marina's on June 19, 2017. Mr. Ratnam and Ms. Chandrakumaran became the Directors of Marina's and agreed that the Prodromous had no personal liability for any outstanding wages to the Employees.

10. The Employees, who are married to each other, were both employed as cooks at Marina's, a restaurant in Nanaimo, British Columbia, between June 1, 2016, and mid-2017. They were initially hired by the Prodromous and were employed at Marina's on work permits.
11. Mr. Giouroukas informed the delegate that after working a shift on July 16, 2017, he believed Mr. Ratnam was accusing him of theft and became very upset. He felt ill and went to the hospital. The doctor told Mr. Giouroukas that he was not medically fit to return to work and provided him with a note that he was to be off work for three days. Mr. Giouroukas said that he gave the note to Mr. Ratnam the following day.
12. Mr. Giouroukas then saw his family physician who gave him a series of notes indicating that Mr. Giouroukas was not able to work until July 31, 2017, then until August 14, 2017, and then for an additional two weeks. Mr. Giouroukas said that he also gave the first two notes to Mr. Ratnam. When he arrived at the restaurant to give Mr. Ratnam the final note, the restaurant was closed. Although Mr. Giouroukas knocked on the door, Mr. Ratnam refused to let him in or speak to him. Mr. Ratnam told Mr. Giouroukas to leave and telephoned the police, informing them that Mr. Giouroukas was trespassing.
13. The police attended at Mr. Giouroukas' home to question him about the incident. When Mr. Giouroukas informed them that he was an employee, a police officer told Mr. Giouroukas that Mr. Ratnam said that he had fired him, and then also said that Mr. Giouroukas had quit. The police officer told Mr. Giouroukas not to return to Marina's. The delegate reviewed a copy of the police report, which contained information that Mr. Ratnam told the officer that Mr. Giouroukas had quit.
14. Mr. Giouroukas denied that he had quit his employment, that he had given Mr. Ratnam three medical notes without incident, and until August 14, 2017, believed he was still an employee at Marina's. Mr. Giouroukas informed the delegate that because he was working at Marina's on a work permit which restricted his employment in Canada to that location, he never considered quitting his job. Although Mr. Giouroukas was deemed fit to return to work on November 1, 2017, he could not return to work at Marina's because Mr. Ratnam had denied him permission to return to the premises and the police officer told him not to go to the restaurant.
15. Mr. Giouroukas did not return to work.
16. Ms. Koukoutselou said that on August 13, 2017, Mr. Ratnam and a new manager, Paul Gouda ("Mr. Gouda"), were engaged in a verbal dispute. The dispute caused Mr. Gouda, and several other employees who were working that night, to quit their employment. When Ms. Koukoutselou reported for work on August 15, 2017, the restaurant door was locked and there was a notice on the door indicating that the restaurant was temporarily closed for renovations. When Ms. Koukoutselou contacted Mr. Ratnam to inquire into the circumstances, Mr. Ratnam refused to speak with her and hung up. Ms. Koukoutselou provided the delegate with a photo of the notice on the door. The notice indicated that Marina's was undergoing minor renovations and was closed temporarily.
17. Mr. Ratnam advised the delegate that he closed Marina's temporarily on August 13, 2017, because he did not have any employees. It reopened some time later after Mr. Ratnam hired new staff.

18. Mr. Giouroukas filed his complaint on August 14, 2017, and Ms. Koukoutselou filed her complaint on August 17, 2017.
19. At issue before the delegate was whether the Employees were owed compensation for length of service and wages.
20. On September 11, 2017, the delegate issued a Demand for Employer records, requiring the records to be produced by September 20, 2017. Marina's did not produce any records in response to the Demand either by the deadline or at any time during the investigation.
21. Mr. Ratnam denied owing compensation for length of service to Ms. Koukoutselou, contending that she told Ms. Chandrakumaran that she quit. When the delegate contacted Ms. Chandrakumaran to verify what Ms. Koukoutselou said to her on her last day of work, Ms. Chandrakumaran stated that Ms. Koukoutselou told her that "there were too many problems and she quit." During the delegate's conversation with Ms. Chandrakumaran, Mr. Ratnam took the phone and the delegate was unable to speak with her further. Mr. Ratnam became upset with the delegate, informing her that Ms. Chandrakumaran did not speak English well and stated that all the employees, including Ms. Koukoutselou, had quit their employment. The delegate ended the call when Mr. Ratnam continued to yell at her.
22. Neither Mr. Ratnam nor Ms. Chandrakumaran contacted Ms. Koukoutselou after August 13, 2017, to confirm that she had quit or ask her whether she wanted to return.
23. On November 10, 2017, the delegate sent Marina's her preliminary findings regarding Ms. Koukoutselou's complaint. The preliminary findings letter informed Marina's that, based on the evidence provided to date, Ms. Koukoutselou was owed regular wages, statutory holiday pay, and compensation for length of service. Marina's was invited to provide any further information they wished the delegate to consider.
24. On December 11, 2017, Mr. Ratnam attended the Nanaimo Employment Standards Branch office and paid the outstanding regular wages for hours worked and statutory holiday pay owed to Ms. Koukoutselou. He continued to deny owing Ms. Koukoutselou compensation for length of service. He also contended that Mr. Giouroukas was not entitled to any further wages or compensation for length of service. When the delegate inquired into the basis for Marina's assertion that Mr. Giouroukas had quit his employment, Mr. Ratnam stated that Mr. Giouroukas said "I am quitting" when he left Marina's. When the delegate informed Mr. Ratnam that Mr. Giouroukas had gone to the hospital, Mr. Ratnam indicated he did not know where Mr. Giouroukas had gone. Mr. Ratnam did not deny Mr. Giouroukas' evidence that he had given Mr. Ratnam three medical notes indicating that he was unable to work due to illness. The delegate asked Mr. Ratnam why Mr. Giouroukas would give him medical notes if he quit and why Mr. Ratnam would accept them if he was no longer an employee. Mr. Ratnam responded that Mr. Giouroukas was "playing games," and that if an employee quit and then changed their mind, they had still quit.
25. Mr. Ratnam also disputed Mr. Giouroukas' claim for overtime wages and disputed the evidence of witnesses stating that they were "all liars". He did not dispute that Mr. Giouroukas worked six days a

week but asserted that Mr. Giouroukas was paid a salary and that salaried employees did not get paid overtime.

26. When the delegate asked Ms. Koukoutselou about Ms. Chandrakumaran's assertion that she had quit her employment because there were too many problems, Ms. Koukoutselou acknowledged that she might have said there were a lot of problems at the restaurant, but denied saying that she had quit. She said that she had no intention of quitting her job and could not afford to do so. Her husband was on sick leave and they were working at Marina's on work permits.
27. Both the Employees provided their hours of work to the employer in the self-help kit, as well as to the delegate. Mr. Ratnam disputed that Mr. Giouroukas worked overtime.
28. The delegate also spoke with a number of witnesses, including the former owners of Marina's, as well as several former employees, all of whom confirmed the Employees' evidence.
29. The delegate reviewed the evidence in light of Tribunal jurisprudence on the issue of whether the Employees quit their employment. She noted that, before an employer could be relieved of its obligation to pay compensation for length of service under section 63 of the *ESA*, there had to be unmistakable evidence of an employee's voluntary intention to quit.
30. The delegate preferred the evidence of both of the Employees over that of Marina's. She noted the Employees' evidence was confirmed by witnesses, documentary evidence, the fact that both the Employees were working on a work permit that restricted their place of work, and the fact that Mr. Giouroukas was on sick leave and Ms. Koukoutselou could not afford to quit. The delegate found that Marina's had not provided evidence that either Employee had voluntarily formed and communicated their intent to quit their employment.
31. The delegate found both Employees were entitled to compensation for length of service.
32. The delegate also determined that Mr. Giouroukas worked on the day he left to go to the hospital and was entitled to wages for that day.
33. Finally, the delegate also found, based on the evidence, including witness statements, that Mr. Giouroukas was entitled to overtime wages and statutory holiday pay. The delegate found Mr. Giouroukas' records of the time he worked to be the best evidence in determining his wages owing.

ARGUMENT

34. Marina's appeal submission consists of background information coupled with complaints and allegations about a number of individuals, including witnesses, the former owners of Marina's, and the delegate. I have not set out all of the allegations, nor will I refer to many them further, as they do not relate to any grounds of appeal.
35. The allegations that I am able to discern that do relate to the grounds of appeal are as follows:
 - the delegate "wrote things which I did not mention at all";

- all of the parties “lied” and collaborated against [Mr. Ratnam];
- the delegate was “ignorant” and “racist.” I infer from his submission that he also believes that she abused her authority.

ANALYSIS

36. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind, the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

- (a) the appeal is not within the jurisdiction of the tribunal;
- (b) the appeal was not filed within the applicable time limit;
- (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
- (d) the appeal was made in bad faith or filed for an improper purpose or motive;
- (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
- (f) there is no reasonable prospect the appeal will succeed;
- (g) the substance of the appeal has been appropriately dealt with in another proceeding;
- (h) one or more of the requirements of Section 112(2) have not been met.

37. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

38. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I am not persuaded that Marina’s has met that burden.

Failure to comply with the principles of natural justice

39. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker. It does not mean that the Director’s delegate must arrive at a conclusion the appellant considers just and fair.

40. There is nothing in Marina’s appeal submission that establishes that the delegate failed to provide it with sufficient information about the case Marina’s had to meet. Furthermore, I note that both Employees provided Marina’s with self-help kits, so it was well aware of the claims they were making. I also note that on November 10, 2017, prior to issuing the Determination, the delegate sent a preliminary findings letter to Marina’s offering it an opportunity to provide any further information it

felt important. I further note that Mr. Ratnam paid an amount to the Employment Standards Branch for amounts he apparently conceded owing to Ms. Koukoutselou.

41. Although Marina's contends that the delegate wrote things he did not say, it is clear that the delegate did give Mr. Ratnam a full opportunity to respond. While Mr. Ratnam disagrees with the delegate's recounting of his evidence, I find no basis to conclude that Marina's was denied an opportunity to be heard.

42. Marina's further contends that the delegate was "racist", which I infer to suggest that she was biased against Mr. Ratnam and Ms. Chandrakumaran based on their ethnicity.

43. The Tribunal has addressed the onus on persons making allegations of bias in several decisions: see for example *Re: Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99, and *Cyberbc.Com AD & Host Services Inc. operating as 108 Tempo and La Pizzaria*, BC EST # RD344/02 (Reconsideration of BC EST # D693/01) and *Tyrone Daum*, BC EST # D123/16.

44. An allegation of bias against a decision maker is a serious one and should not be made speculatively:

An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.))

45. To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well-founded upon the evidence, it is not something that should ever be said. (*Vancouver Stock Exchange v. British Columbia (Securities Commission)* (B.C.C.A) September 28, 1999)

46. As the Supreme Court in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, stated:

Regardless of the precise words used to describe the test (of apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.

47. The onus of demonstrating bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

48. Mr. Ratnam makes the allegations of bias without any evidence whatsoever. His accusations appear to stem from the fact that the delegate preferred evidence of all the witnesses, which cast him in a negative light, over his evidence. I reject Marina's allegations entirely. Not only are they made without any foundation, they are unsupported by the record.

Error of law

49. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the Assessment Act];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

50. Marina’s has not set out any basis for this ground of appeal other than Mr. Ratnam’s argument that the delegate wrote things he did not say. It may be that the delegate misstated or mischaracterized some of what Mr. Ratnam told her. However, I accept that the delegate’s recounting of the evidence is generally accurate. The record demonstrates that although Marina’s was given the opportunity to respond to the delegate’s preliminary findings, Marina’s didn’t do so.

51. In light of all of the evidence, I am not persuaded that the delegate erred in law in concluding that the Employees were entitled to compensation for length of service or wages. I find that the delegate fairly considered all of the evidence before her and, based on that evidence and the application of the appropriate sections of the *ESA*, came to the correct result. There is nothing in the record that could have led the delegate to find that Marina’s had discharged its burden of establishing that the Employees unequivocally quit their employment.

52. That Marina’s disagrees with the result is not a basis for an appeal on this ground.

New Evidence

53. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

54. It is not entirely clear what the new evidence is on appeal. Marina's has submitted a June 14, 2017 document from Island Health regarding an inspection of the facilities, an undated list of Marina's staff which appears to be taken from the purchase documents, an October 23, 2017 WorkSafe BC letter to Mr. Giouroukas at Marina's, as well as other documents which were included as part of the record.
55. The material submitted on appeal either does not meet the test for new evidence or are irrelevant to the issues on appeal. The documentation from Island Health and the staff list are unrelated to the issues of wages or compensation for length of service. Furthermore, all of the documents were available during the investigation, and had Marina's considered them relevant, they ought to have been provided to the delegate. In any event, I am not persuaded that the "new evidence" would have led the delegate to a different conclusion on the issue of whether or not the Employees were entitled to compensation for length of service (i.e., whether Marina's had established that they quit) or wages.
56. The appeal is dismissed.

ORDER

57. Pursuant to section 115 of the *ESA*, I Order that the Determination dated February 23, 2018, be confirmed in the amount of \$9,014.22, together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal