Citation: Karakoram Restaurant Inc. (Re)
2020 BCEST 139

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Karakoram Restaurant Inc.
("Karakoram")

- 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: Maia Tsurumi

FILE NO.: 2020/101

DATE OF DECISION: December 03, 2020

DECISION

SUBMISSIONS

Kashif Ahmed — counsel for Karakoram Restaurant Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Karakoram Restaurant Inc. ("Karakoram") has filed an appeal of a determination (the "Determination") issued by Chantelle MacInnis, a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on May 27, 2020. In the Determination, the Delegate found Karakoram violated sections 16 (minimum wage), 17 (payment of wages owed within 8 days after the end of a pay period), 18 (payment of wages owed within 48 hours of termination), 27 (wage statements), 40 (overtime wages), 45 (statutory holiday pay), 46 (pay for work on a statutory holiday), 58 (vacation pay), and 63 (compensation for length of service) of the *ESA*. The Delegate ordered Karakoram to pay $18,901.23 in wages (including accrued interest under section 88 of the *ESA*) to the Complainant and also imposed $3,500 in administrative penalties.

2. Karakoram appeals the Determination on the grounds that the Delegate made an error of law by relying on unreliable evidence in making her Determination.

3. Karakoram also requests an extension of time to the statutory appeal period pursuant to sub-section 109(1)(b) of the *ESA*.

4. I have decided that this appeal is appropriate for consideration under sub-section 114(1) of the *ESA*. Under sub-section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without hearing, for any of the following reasons:

   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 or 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 that the appeal will succeed;

   g) the substance of the appeal has been appropriately dealt with in another proceeding; and

   h) one or more of the requirements of section 112(2) have not been met.

5. For the reasons set out below, I dismiss the appeal pursuant to section 114(1)(f) of the *ESA*.

6. My decision is based on the submissions made by Karakoram in its Appeal Form, the sub-section 112(5) record (the "Record"), the Determination, and the Reasons for the Determination.

ISSUE

7. The issue before me is whether this appeal shows any reasonable prospect that it will succeed.

THE DETERMINATION

Background

8. Karakoram operates a restaurant in Vancouver, British Columbia. Mr. Qasim Mehmood ("Mr. Mehmood") is its sole director, owner, and head chef. Ms. Saima Haider (the "Complainant") was an employee of Karakoram from August 5, 2018 to January 17, 2019. She was employed in various capacities, including as a bookkeeper. She filed a complaint (the "Complaint") under the *ESA* for unpaid regular wages, overtime pay, and statutory holiday pay.

9. A hearing was held on August 21, 2019, and the Delegate issued her Determination on May 27, 2020.

10. At the hearing, the Delegate heard evidence from Mr. Mehmood, the Complainant, and Mr. Sikandar Khan ("Mr. Khan"). Mr. Khan was a director of Karakoram between April 27 and May 1, 2019.

Issues Before the Delegate

11. The issue before the Delegate was whether Karakoram contravened the *ESA* by failing to pay regular wages, overtime pay, and statutory holiday pay. The specific issues in dispute involved the Complainant's start date, hours of work, wage rate, and wages owing.

The Delegate's Decision

12. In the Determination, after setting out the evidence provided by the Complainant, Mr. Khan, and Mr. Mehmood, the Delegate set out her findings on each of the issues before her.

13. The Delegate began by considering the Complainant's length of service. After considering the definition of "*employee*" and "*work*" in the *ESA* and reviewing the evidence, she found the Complainant's first day of employment was August 5, 2018. The evidence included:

    a. the Complainant and Mr. Khan were friends prior to the Complainant's employment relationship with Karakoram;

    b. the Complainant and Mr. Khan's "*vague and un-specific information*" about the Complainant helping from April to August 2018 to get the restaurant open for business;

    c. no one kept track of any time the Complainant may have spent discussing the restaurant's potential menu, location, or décor ideas prior to August 2018;

    d. the Complainant's statement in her Complaint that her first day of work was August 5, 2018;

    e. no express dispute by Mr. Mehmood that the first day of work was August 5, 2018;

    f. nothing about other staff being involved in menu, location, or décor planning; and

g. e-mails from the Karakoram e-mail address and from Mr. Mehmood to the Complainant and other employees on August 12, 2018 welcoming them on board.

14. Because no one kept track of any time the Complainant spent in the early planning stages, the Delegate found this was not time spent working as an employee as defined by the *ESA*.

15. Turning to the Complainant's wage rate, the Delegate found it was $2,500 per month for all hours worked in a month. Her conclusion was based on the following evidence:

a. the Complainant said during the hearing that her wage rate was supposed to be $2,500 per month;

b. the $15.65 per hour wage rate she claimed for non-bookkeeping work was her calculation of a 40-hour work week at the $2,500 per month rate;

c. the $20 per hour wage rate she claimed for bookkeeping hours was what she felt she should be paid, not what was agreed on;

d. the Complainant said at the hearing there was no expectation she would work 40 hours per week, and she knew she would need to work far more than 40 hours per week to get the restaurant going and make it a success;

e. Mr. Khan said the Complainant's wage rate was $2,500 per month and although he also said this was to cover 40 hours of work per week, he knew the Complainant would be working much more than that to contribute to the success of the restaurant;

f. Mr. Mehmood admitted he agreed to pay the Complainant $2,500 per month in March 2019; and

g. while Karakoram's position was that the Complainant's wage rate was "*minimum wage*", there was no evidence that it paid her minimum wage;

16. The Delegate noted section 16 of the *ESA* requires employers pay at least the agreed-upon rate of pay, but this cannot be less than the minimum wage. The Delegate found that the $2,500 wage rate per month for all hours worked was substantiated in the information provided by the Complainant and Mr. Khan and in a letter from Mr. Mehmood to the Complainant.

17. With respect to the Complainant's hours of work, the Delegate found the best evidence was the records submitted by the Complainant, along with her clarifications about her hours on January 10 – 12, 2019, and so she concluded this evidence represented the hours worked. Her finding was based on the following:

a. the Complainant said she was initially hired as a bookkeeper, but once the restaurant opened on August 31, 2018, she began doing additional tasks such as serving, shopping for food, dishwashing, cleaning, and organizing the kitchen. Mr. Khan agreed this was the work done by the Complainant and Mr. Mehmood did not dispute this;

b. Mr. Khan and the Complainant submitted the same records of hours she worked and the three discrepancies for January 10-12, 2019 were explained by the Complainant and not disputed by Mr. Khan;

c. Mr. Mehmood said he disagreed with the Complainant's record of hours because the restaurant closed at 11:00 p.m. and it only took 30 minutes to clean-up and go home. The Delegate inferred from this that Mr. Mehmood knew the Complainant was working after closing and cleaning-up;

d. Mr. Mehmood left the restaurant at 11:00 p.m. and had no first-hand observations about how long it took to clean-up;

e. Mr. Mehmood said employees were supposed to log in and out of the employee log at the restaurant, but he also said he was the one who recorded the Complainant's hours of work;

f. the parties did not dispute it was the Complainant's duty as bookkeeper to record employee hours of work; and

g. the employee log submitted by Mr. Khan and the records submitted by the Complainant show other employees' hours of work.

18. Based on the above, and in particular that the Complainant's duties included recoding her and other employees' hours of work, that the records she produced included other employees' hours of work, and that the records submitted by the Complainant and Mr. Khan were the same, the Delegate preferred the records submitted by the Complainant and Mr. Khan over the records submitted by Mr. Mehmood. The Delegate also did not find it reasonable to conclude that Mr. Mehmood kept track of the Complainant's hours when he was not always at the restaurant during all of the time she worked.

19. Next, the Delegate turned to the question of wages earned and wages paid.

20. Mr. Mehmood stated that the Complainant's tips formed part of her wages paid. However, the *ESA* does not include gratuities in its definition of "*wages*". Therefore, the Delegate found that any tips given to the Complainant were in addition to her wages earned and were not to be factored into the calculation of wages paid and/or owing. Similarly, Mr. Mehmood's claim that the value of the food taken by the Complainant was part of her wages was rejected. Section 20 of the *ESA* says wages have to be in Canadian currency. Food cannot be used to pay employees.

21. The parties agreed the Complainant was paid $4,800 in wages. The Delegate noted that while Mr. Mehmood initially said the Complainant was paid $5,800, he clarified at the hearing she was paid $4,800. On the one hand he admitted she was paid $1,000 by e-transfer and said the Complainant paid herself the remaining $3,800 by fraudulent cheques, but on the other hand he admitted she was paid $4,800 in wages and she earned more wages than she was paid. Because of these inconsistencies, the Delegate found the payments of $3,800 by cheque were not fraudulent.

22. The Delegate stated that section 17 of the *ESA* requires wages be paid at least semi-monthly, but the parties agreed the Complainant received four payments on the following approximate dates: (1) November 6, 2018 ($1,000 by e-transfer); (2) November 30, 2018 ($1,500 by cheque); (3) January 2, 2019 ($1,500 by cheque); and (4) February 2, 2019 ($800 by cheque).

23. Given all the hours worked by the Complainant, the Delegate's finding that the Complainant's wage rate was $2,500 per month for all hours worked meant that she was not paid the minimum hourly wage rate. Thus, the Delegate found the Complainant was entitled to be paid at least $12.65 per hour for all hours

worked: *ESA*, section 16. The Delegate calculated the wages owing based on the records submitted by the Complainant (see above) and a wage of $12.65 per hour. The Delegate set out her calculations in a sheet appended to her Determination.

24. Section 40 of the *ESA* requires an employer pay an employee who works over 8 hours a day at the rate of 1.5 times the employee's regular wage for the time worked over 8 hours and double the regular wage for any time worked over 12 hours. Section 40 also requires an employer play an employee who works over 40 hours in a week 1.5 times their regular wage for the time worked over 40 hours. Based on her finding of the hours worked by the Complainant, the Delegate found she was entitled to overtime wages as set out in the calculation sheet appended to her Determination.

25. Section 44 of the *ESA* requires payment of statutory holiday pay in accordance with sections 45 and 46, if an employee has been employed for at least 30 calendar days before the holiday and worked or earned wages for 15 of the 30 calendar days before the holiday. The Delegate found the Complainant qualified for statutory pay for four statutory holiday days. The Delegate determined the Complainant was entitled to an average day's pay for each of the four holidays and 1.5 times her regular hourly wage for the 10 hours she worked on two of the days: *ESA*, sections 45 and 46. The Delegate's calculations were set out in the sheet appended to her Determination.

26. Under section 58 of the *ESA*, the Complainant was also entitled to 4% vacation pay on all wages earned.

27. The final issue was compensation for length of service. Section 63 of the *ESA* requires compensation for length of service if an employer terminates an employee. The Delegate found the Complainant was entitled to one week of pay as compensation for length of service.

28. Under section 66 of the *ESA*, if an employer substantially alters a term or condition of employment, the Director, or delegate, can determine that the employment has been terminated. The Delegate concluded that Karakoram substantially changed the terms and conditions of the Complainant's work and so she was essentially forced to quit. By not paying the Complainant regularly or consistently for all of her hours, Karakoram changed this fundamental condition of her employment.

29. The Delegate imposed administrative penalties of $500 for each violation of the *ESA* described above (*ESA*, sections 16, 17, 40, 45 and 46) and an administrative penalty of $500 for not paying all wages earned within 48 hours of January 17, 2019 (*ESA*, section 18) and a penalty of $500 for not providing the Complainant with a written statement of wages (*ESA*, section 27).

30. In summary, the Delegate found Karakoram contravened sections 16 (minimum wage), 17 (payment of wages owed within 8 days after the end of a pay period), 18 (payment of wages owed within 48 hours of termination), 27 (wage statements), 40 (overtime wages), 45 (statutory holiday pay), 46 (pay for work on a statutory holiday), 58 (vacation pay), and 63 (compensation for length of service) of the *ESA*. She ordered Karakoram to pay $18,901.23 in wages (including accrued interest under section 88 of the *ESA*) to the Complainant and she also imposed $3,500 in administrative penalties for violations of sections 16 – 18, 27, 40, 45, and 46.

ARGUMENT

31. Karakoram submits that the Determination should be cancelled, and the Complaint referred back to the Director because the Delegate preferred the Complainant's and Mr. Khan's evidence over Mr. Mehmood's evidence about the hours the Complainant worked. Karakoram asserts that the Delegate erred in this respect because:

a. Mr. Khan's evidence was unreliable because he was in a conflict of interest as follows:

i. Mr. Khan is the Complainant's friend; and

ii. Mr. Khan had a falling out with Mr. Mehmood;

b. the Delegate disregarded Mr. Mehmood's evidence;

c. the Delegate found both the Complainant and Mr. Khan provided "*vague and non-specific information*" during the hearing; and

d. the records submitted by Mr. Khan and the Complainant about her hours of work from August 2019 and January 2019, showed that Mr. Mehmood worked no hours, which is not credible.

ANALYSIS

32. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on any of the following grounds:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was being made.

33. Karakoram does not allege a breach of procedural fairness nor does it bring forward new evidence in this appeal. Rather, it alleges the Delegate erred in law in making the Determination by relying on unreliable evidence.

34. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined questions of law in the context of an appeal of a tribunal's determination. In this context, an error of law occurs in the following situations:

a. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;

b. a misapplication by the decision-maker of an applicable principle of general law;

c. where a decision-maker acts without any evidence;

d. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or

e. where the decision-maker is wrong in principle.

35. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5, at para. 36.

36. Karakoram submits that the error of law in this appeal is that the Delegate made a palpable and overriding error in her finding of fact about the Complainant's work hours. Karakoram does not submit that there was any misinterpretation or misapplication by the Delegate of a section of the *ESA* or any misapplication of an applicable principle of general law or that the Delegate was otherwise wrong in principle. Thus, the basis for the appeal is that the Delegate acted on a view of the facts that could not reasonably be entertained, or possibly, that the Delegate acted without any evidence.

37. While Karakoram disagrees with the Delegate's view of the evidence, I find she did not make her Determination without any evidence. Further, for the reasons that follow I find that the Delegate's conclusion was reasonable based on the evidence.

38. First, there was undisputed evidence on which the Delegate based her conclusion. The Complainant, Mr. Khan, and Mr. Mehmood all said the Complainant worked in the restaurant as more than just a bookkeeper. The Complainant, Mr. Khan, and Mr. Mehmood also agreed it was the Complainant's duty as the bookkeeper to record the hours worked by the employees. The Complainant, Mr. Khan, and Mr. Mehmood also agreed there was an employee log kept at the restaurant where employees were to record the hours they worked.

39. Second, it was open to the Delegate to prefer the Complainant's and Mr. Khan's evidence about the hours worked by the Complainant. The Delegate expressly acknowledged Mr. Khan was the Complainant's friend and that he had had a falling out with Mr. Mehmood. Nevertheless, in the context of all of the evidence, she determined that Mr. Khan's evidence was more reliable and credible than Mr. Mehmood's. It was open to her to do so. The Delegate heard their testimony, and in the Determination, she reviewed all of the parties' evidence. She had corroborating evidence from the Complainant, she had texts, e-mails, and letters among the parties, and she had evidence from Mr. Mehmood that she found internally inconsistent. For example, Mr. Mehmood said employees were supposed to log in and out of the employee log at the restaurant, but he also said he was the one who recorded the Complainant's hours of work. Similarly, while he said he was the one who recorded the Complainant's hours, he also said he left the restaurant at 11:00 p.m. This was inconsistent with his submission that he recorded the Complainant's hours each day, as he would not have been at the restaurant to know when she finished (and I note there were no communications in the Record demonstrating that the Complainant was reporting hours worked to Mr. Mehmood after the fact).

40. I find no error of law in the Delegate finding that Mr. Khan's and the Complainant's evidence was credible on the hours worked issue even though they provided "*vague and non-specific information*" during the hearing. The Delegate noted they provided vague and non-specific information about the nature of the Complainant's relationship with Karakoram prior to August 2018 and so she did not accept their evidence as proof of employment during this time and she determined the Complainant only became an employee as of August 5, 2018. In contrast, she did not find their evidence about the employment relationship after this date to be vague and non-specific and she reviewed it in detail. The Delegate's statement about the reliability of their evidence about the pre-August employment relationship was not a finding about the

reliability of all their evidence. She made each of her findings based on the specific evidence that related to each issue and reasonably found Mr. Khan's and the Complainant's evidence credible on the question of the hours worked by the Complainant.

41. I also find no error of law in the Delegate's consideration of the employee logs submitted by the Complainant and Mr. Khan, even though those logs recorded no hours for Mr. Mehmood. The logs showed the hours worked by Mr. Khan, the Complainant, and another employee. While there is a column in which Mr. Mehmood's hours could be recorded, the fact that the logs did not record any hours for him does not mean the other hours logged were wrong, but merely that Mr. Mehmood's hours were not recorded in the employee log.

42. Finally, I note that Karakoram does not dispute Mr. Khan's evidence on a number of other points even though the alleged conflict of interest argument would presumably apply to all of his evidence.

43. In conclusion, I find Karakoram's appeal has no reasonable prospect of success.

44. Karakoram also requested an extension of time to the statutory appeal period pursuant to sub-section 109(1)(b) of the *ESA*. As I have dismissed the appeal on its merits, it is unnecessary to consider this request.

ORDER

45. Pursuant to sub-section 114(1)(f) of the *ESA,* I dismiss the appeal as having no prospect of success and pursuant to sub-section 115(1) of the *ESA,* I order the Determination, dated May 27, 2020, confirmed in the amount of $22,401.23, together with any further interest accrued under section 88 of the *ESA*.

Maia Tsurumi
Member
Employment Standards Tribunal