

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Little Jumbo Restaurant Corp.
carrying on business as Little Jumbo Restaurant & Bar
("Little Jumbo")

- 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.: 2021/099

DATE OF DECISION: March 31, 2022

DECISION

SUBMISSIONS

Bruce Gillespie	on behalf of Little Jumbo Restaurant Corp. carrying on business as Little Jumbo Restaurant & Bar
Madison Sutcliffe	on her own behalf
Mitch Dermer	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Little Jumbo Restaurant Corp. carrying on business as Little Jumbo Restaurant & Bar (“Little Jumbo”) has filed an appeal of a determination (the “Determination”) issued by Mitch Dermer, a delegate (the “Adjudicative Delegate”) of the Director of Employment Standards (the “Director”) on October 20, 2021. The Adjudicative Delegate determined Little Jumbo breached sections 18 (payment of wages after termination) and 58 (annual vacation pay) for failing to pay vacation pay to Madison Sutcliffe (the “Complainant”). There was also accrued interest and two mandatory administrative penalties of \$500 each for the contraventions of sections 18 and 58.
2. Little Jumbo appeals the Determination on the grounds that the Delegate failed to observe principles of natural justice and there is new evidence.
3. For the reasons set out below, I dismiss the appeal.
4. My decision is based on the submissions made by Little Jumbo in its initial appeal submissions filed with its Appeal Form (the “Initial Submissions”), the sub-section 112(5) record (the “Record”), the Determination, the Reasons for the Determination (the “Reasons”), submissions made by the Director (the “Director’s Submissions”), submissions made by the Complainant (the “Complainant’s Submissions”) and Final Reply submissions from Little Jumbo (the “Final Reply”).

ISSUES

5. The issue before the Employment Standards Tribunal (the “Tribunal”) is whether this appeal should be allowed or dismissed.

THE DETERMINATION

Background

6. Little Jumbo operates a restaurant and bar in Victoria, British Columbia. The Complainant worked for Little Jumbo from August 19, 2019 to September 5, 2020.

7. The complaint (the “Complaint”) was filed on October 27, 2020. The Determination was issued on October 20, 2021.

Issue for determination

8. The issue for determination was whether the Complainant was entitled to vacation pay.

Investigation Report

9. On July 26, 2021, Sheri Bor, a delegate of the Director (the “Investigative Delegate”) issued an investigation report (the “Investigation Report”) about the Complaint. It described the Complaint, the investigation process (the “Investigation”) and the information provided by the Complainant and Little Jumbo and included a list of relevant records and documents (Record, pp. 1 – 9).
10. The Investigation Report stated Little Jumbo and the Complainant had until August 6, 2021, to respond in writing and that any responses would be considered in making a final determination about the Complaint (Record, p. 1). The Investigation Report also asked the parties to advise the Investigative Delegate if they did not wish to provide a response to the Investigation Report (Record, p. 1).
11. The Record indicates the Investigative Delegate e-mailed the Investigation Report to Little Jumbo on July 22, 2021, with a note that the Investigation Report would be forwarded to a decision maker for a determination in August 2021 (Record, p. 97). The e-mail said the parties would also receive a copy of the Investigation Report via mail.
12. The Complainant responded in writing to the Investigation Report via e-mail on July 22, 2021 (Record, p. 103). Little Jumbo did not respond.

The Determination

13. The Adjudicative Delegate issued the Determination with Reasons on October 20, 2021. He found the Complainant was not paid vacation pay from February 16, 2020 to September 5, 2020, in the amount of \$1,647.36. He found the Complainant was also entitled to interest of \$45.43 under section 88 of the *ESA*.
14. In making the Determination, the Adjudicative Delegate reviewed the parties’ evidence and submissions provided to the Investigative Delegate. Essentially, Little Jumbo said the Complainant took her vacation as time in lieu in late March to early April 5, 2020, when she was self-isolating at home and in August and September 2020 when she worked few hours, took time off to move residences and did not work to the end of her notice period. Little Jumbo also said the Complainant did not complete her assigned work before she left her employment. The Complainant said she never took any vacation time in March to April or August and September 2020 and said she did not receive clear instructions from Little Jumbo as to what work it wanted her to do before she left her position.
15. The Complainant provided e-mail and text messages, which showed she was doing work in the late March to early April 2020 period. She also provided telephone records showing phone calls she made to Mr. Gillespie and Little Jumbo’s premises. The Complainant provided documents showing she did work in

August 2020, including a work schedule. She also submitted her employment agreement, record of employment and wage statements.

16. Little Jumbo provided its salary payroll for 2020, a payroll summary, vacation accrual transactions and summary and restaurant schedules for July through September 2020.
17. The Adjudicative Delegate noted there was no indication on the Complainant's wage statements that she was paid vacation pay at any point from February 16, 2020, onwards. Neither did any of Little Jumbo's documents indicate vacation was used or paid out to the Complainant. The Adjudicative Delegate concluded if the alleged time off was properly vacation pay, it would have been reflected in the wage statements. The Adjudicative Delegate said if Little Jumbo had wanted to qualify salary it paid to the Complainant as vacation pay, it should have recorded this in a contemporaneous business record like the Complainant's wage statements, and it did not do so. The Adjudicative Delegate was not persuaded by Little Jumbo's bare assertion that the Complainant used her vacation days in March, April, August and September 2020, given the uncontested evidence from the Complainant that she was doing at least some work during these periods.
18. The Adjudicative Delegate imposed mandatory penalties of \$500 each for Little Jumbo's breaches of sections 18 (paydays) and 58 (vacation pay).

ARGUMENTS

Little Jumbo

19. In its Initial Submissions, Little Jumbo submits the Adjudicative Delegate failed to observe principles of natural justice because it did not receive the Investigation Report until August 9, 2021, which was after the response deadline of August 6, 2021, and therefore it did not have an opportunity to correct alleged inaccuracies and provide more detail to support its case.
20. Little Jumbo also makes submissions about the merits of the appeal, which appear to be similar to those it made to the Investigative Delegate during the Investigation, which are that the Complainant: (1) did not work the hours she was required to work; (2) breached her employment agreement; (3) took unauthorized days off; (4) did not complete her assigned work; and (5) was paid for more hours than she worked. In support of these submissions, Little Jumbo submitted its calculations about the days the Complainant worked versus the days she was paid for. Little Jumbo also says the Adjudicative Delegate erred in determining the Complainant was owed vacation pay at a rate of 6% as per her employment agreement when, according to Little Jumbo, the Complainant breached this agreement.
21. In the Reply, Little Jumbo's director, Mr. Gillespie, said he was away from home when the Investigation Report was delivered by registered mail, and he was also without cell and e-mail service. However, I note he did not say how long he was without e-mail service or what the date was when he received the Investigation Report by e-mail. Little Jumbo also did not provide any explanation as to why it did not contact the Employment Standards Branch (the "Branch") or otherwise attempt to make any submissions about the content of the Investigation Report, any time after the August 9, 2021, deadline.

22. Little Jumbo makes several other submissions in its Final Reply, including about the difficulties it has had over the past two years because of the impact of Covid-19 on its business, Mr. Gillespie's awareness of the *ESA* and his generally positive experience dealing with the Branch in the past, Mr. Gillespie's belief that the Complaint should have been resolved by mediation and that Little Jumbo has been treated unfairly (including in the impositions of administrative penalties), and Mr. Gillespie's view of the facts. It also repeats substantially many of the same points it made about the merits of the appeal in its Initial Submissions. Little Jumbo also says the Adjudicative Delegate miscalculated the length of the Complainant's notice period. This latter submission was not made in its Initial Submissions and does not respond to anything in the Director's Submissions or the Complainant's Submissions. I do not, however, find it necessary to seek the position of the other parties on this latter submission. It is not properly within the scope of a reply.

Complainant

23. The Complainant notes the envelope in which Little Jumbo received a hard copy of the Investigation Report has a handwritten date on it. She appears to suggest Little Jumbo's submission that it did not receive the Investigation Report until August 9, 2021, may be misleading. The Complainant also says she had ample time to respond to the Investigation Report before the August 6, 2021, deadline.

Director of Employment Standards

24. The Director points out that an electronic copy of the Investigation Report was sent to Little Jumbo on July 22, 2021, at the e-mail address used as its point of contact throughout the Investigation, without any problems. The Director also says the Determination was not issued until October 20, 2021, but Little Jumbo did not at any time respond to the Investigation Report or contact the Branch to say it did not have an opportunity to respond.

ANALYSIS

25. 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.
26. For the reasons that follow, I dismiss the appeal. There was no breach of principles of natural justice. Little Jumbo knew the case it had to meet and was given a fair opportunity to respond. Also, Little Jumbo's additional evidence is not admissible as new evidence and there was no error of law.

Procedural fairness

27. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure parties know the case made against them, are given an opportunity to reply to the case against them and

have their case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27, and *Re Imperial Limousine Service Ltd.*, BC EST # D014/05 at para. 27; see also *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 SCR 653, and *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 22.

28. Procedural fairness requirements in administrative law are functional, and not technical, in nature. They are also not concerned with the merits or outcome of the decision. The question is whether, in the circumstances of a given case, the party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65.
29. In *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra* at paras. 23 - 27, the Supreme Court of Canada identified a non-exhaustive list of factors that “*should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances.*” Those factors are:
- a. the nature of the decision being made and the process followed in making it;
 - b. the nature of the statutory scheme and the terms of the statute under which the administrative decision was made;
 - c. the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated;
 - d. the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances;
 - e. the choice of procedures made by the administrative-decision maker and its institutional constraints. Important weight must be given to the choices of procedures adopted by the decision-maker and its institutional constraints:
30. The nature of the decision was whether the Adjudicative Delegate would find Little Jumbo breached the *ESA* and the Complainant was not paid vacation pay.
31. The process followed in making the decision was an investigation involving evidence gathering from the Complainant and Little Jumbo in the form of telephone calls, e-mails, with follow-up questions, requests for more information and requests for documents.
32. Turning to the statutory scheme and the terms of the statute under which the Branch operates, the *ESA* involves the ongoing regulation of non-union employers. The purposes of the *ESA* are set out in section 2 and include ensuring employees in the province receive at least basic working compensation standards and conditions, promoting the fair treatment of employees and employers and providing fair and efficient procedures for resolving disputes under the *ESA*.
33. The Director’s authority under the *ESA* is broad and includes investigative powers to ensure compliance with the *ESA* and its regulations. An investigation is by its nature different from a quasi-judicial hearing. It is a dynamic process involving information collected from different persons in different circumstances over time. At different points during the investigation, the investigator may have different perspectives or viewpoints that lead them in one direction or another. Section 77 of the *ESA* says the Director must

make reasonable efforts to give a person under investigation an opportunity to respond if an investigation is conducted. This is the statutory scheme's procedural fairness requirement for investigations: *The Director of Employment Standards (Re)*, BC EST # D313/98 at p. 12; *J.C. Creations Ltd. o/a Heavenly Bodies Sport (Re)*, BC EST # RD317/03, pp. 16, 18. This modification of the common law standard is legislative recognition that the Director's role is more subtle and complicated than a quasi-judicial role: *J.C. Creations Ltd. o/a Heavenly Bodies Sport (Re)*, *supra* at p. 12. Section 77 is not intended to be formal and burdensome, especially in the employment standards context, which is designed to be a relatively quick and cheap means of resolving employment disputes: *J.C. Creations Ltd. o/a Heavenly Bodies Sport (Re)*, *supra* at p. 18, citing *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460 at p. 496.

34. The Determination is important to Little Jumbo given that a finding it breached the *ESA* is serious and it is liable for unpaid vacation pay and \$1,000 in mandatory penalties. The Determination is also important to the Complainant who claims she is owed vacation pay for her work.
35. Under section 77, Little Jumbo's legitimate expectations were that the Director would make reasonable efforts to give it an opportunity to respond, which also included full disclosure of the details of the Complaint.
36. The choice of procedure here was completely within the discretion of the Director. The *ESA* does not require a hearing and the Director's decisions are made in a dynamic and fluid environment intended to ensure basic working standards and conditions, fair treatment of employees and employers, and fair and efficient procedures. The Branch and the Director's delegates do not have unlimited resources to adjudicate, investigate and determine each complaint. Important weight must be given to the choices of procedures adopted by the decision-maker and its institutional constraints.
37. I conclude that, overall, the *Baker* factors indicate the circumstances of this case were at the lower end of the spectrum in terms of what procedural rights the duty of fairness required. The decision was significant for both Little Jumbo and the Complainant, but the investigative process followed, the nature of the statutory scheme and the terms of the statute, especially section 77, which largely informs the parties' legitimate expectations, the choice of procedures, and the Branch's institutional constraints all lead me to conclude the required procedural fairness is not high.
38. I now turn to consideration of Little Jumbo's submission that the Branch process was procedurally unfair because it did not receive the Investigation Report until after the deadline for submissions about the Investigation Report were due. Although Little Jumbo did not receive a hard copy of the Investigation Report in the mail until August 9, 2021, this did not make the process unfair. The Record shows the Investigative Delegate e-mailed a copy of the Investigation Report to Little Jumbo on July 22, 2021, using an e-mail address for Mr. Gillespie that was used in prior correspondence without incident (see Record, pp. 89-97). Therefore, Little Jumbo had the Investigation Report 15 days before the deadline for a response. Further, even if Little Jumbo had received the Investigation Report after the response deadline, it made no attempt to get in touch with the Investigative Delegate or the Branch about the Investigation Report and any response it wanted to make.
39. I conclude Little Jumbo had an opportunity to know the case against it and to respond prior to the Adjudicative Delegate making the Determination. Therefore, there was no breach of the principles of natural justice.

Merits of the appeal

40. I find no error by the Adjudicative Delegate regarding the outcome of the Determination. There was no error of law and Little Jumbo's calculations in its Final Reply about the days the Complainant worked versus the days she was paid for are not new evidence for the purposes of this appeal.

41. An appeal is decided on the record before the Director. The only exception to this is if there is new evidence available that was not available at the time the Determination was being decided: *ESA*, sub-section 112(1)(c).

42. The decision in *Bruce Davies et al.*, BC EST # D171/03 at p. 3, provides guidance on how the Tribunal applies sub-section 112(1)(c):

This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence...[The evidence] must meet four conditions:

- (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.

43. Little Jumbo's calculations in its Initial Submissions could have been presented to the Investigative Delegate during the Investigation and thus are not new evidence admissible on appeal.

44. On appeal, Little Jumbo essentially makes the same arguments about the Complainant it provided to the Investigative Delegate, and which were before the Adjudicative Delegate in making his Determination. I find no error of law in the Determination.

45. 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.

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

47. The Adjudicative Delegate did not make an error of law. He did not misinterpret or misapply the *ESA* and its regulations or any applicable principle of general law and was not wrong in principle. What Little Jumbo wants me to do is come to different conclusions than the Adjudicative Delegate based on the same evidence, but I have no jurisdiction to do so. The Tribunal's role is not to review the facts and make different findings of fact if there is a reasonable basis on which the Director or her delegate makes findings. The Adjudicative Delegate acted on evidence he had and did not take a view of the facts that could not reasonably be entertained. The Reasons explain the Adjudicative Delegate's review of the evidence and his conclusions based on that evidence.

48. Regarding the applicable rate of vacation pay, the employment agreement sets out the rate, which the Adjudicative Delegate correctly applied. Whether or not the employment agreement was breached by the Complainant was not an issue within the jurisdiction of the Adjudicative Delegate.

49. Finally, Little Jumbo asked to have the administrative penalties waived because it did not intend to contravene the *ESA*. Once a violation of the *ESA* has been found, an administrative penalty is mandatory: *ESA*, s. 98. Whether or not there was any intention to breach the *ESA* is not relevant and I have no jurisdiction to waive administrative penalties imposed because of a breach of the *ESA*.

ORDER

50. Pursuant to sub-section 115(1)(a) of the *ESA*, I confirm the Determination dated October 20, 2021.

Maia Tsurumi
Member
Employment Standards Tribunal