Citation: Mid Orient Cafe Ltd. (Re)
2022 BCEST 37

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Mid Orient Cafe Ltd.
(the "Appellant")

- 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:** Mona Muker

**FILE NO.:** 2022/099

**DATE OF DECISION:** June 28, 2022

# DECISION

## SUBMISSIONS

Ebrahim Al Shihabi — on behalf of Mid Orient Cafe Ltd.

## OVERVIEW

1. Mid Orient Cafe Ltd. carrying on business as Magic Cut Barbers (the "Appellant") has filed an appeal under section 112 of *the Employment Standards Act* (the "*ESA*") of a determination issued by Carrie H. Manarin, a delegate ("Delegate Manarin") of the Director of the Employment Standards (the "Director"), on March 16, 2022 (the "Determination").

2. The Director found that the Appellant contravened sections 16, 18, 40, 45, and 58, and accordingly owed its former employee, Michelle Bannow (the "Employee"), unpaid wages, overtime pay, statutory holiday pay, annual vacation pay, and accrued interest in the amount of $3,800.44. Pursuant to section 29(1) of the *Employment Standards Regulation* (the "*ESR*"), the Determination also imposed five administrative penalties in the amount of $500.00 each, for contravening sections 16, 18, 28, 40, and 45 of the *ESA*. The total amount payable is $6,300.44.

3. The Appellant appealed the Determination alleging that the Director failed to observe the principles of natural justice in making the Determination, under section 112(1)(b) of the *ESA.*

4. In correspondence dated April 21, 2022, the Employment Standards Tribunal (the "Tribunal") notified the Employee and the Director that it had received the Appellant's appeal and it was enclosing the same for informational purposes only. They were further notified that no submissions on the merits of the appeal were being sought from them at this time. The Tribunal also requested the Director to provide a copy of the section 112(5) record (the "Record").

5. On April 28, 2022, the Tribunal received a submission from Delegate Manarin containing the Record and Record cover letter. On May 4, 2022, the Tribunal requested clarification regarding the content of the Record. On May 4, 2022, the Tribunal received a revised Record index from Delegate Manarin. On May 13, 2022, the Tribunal forwarded a copy of the Record to the Appellant and the Employee. Both parties were provided an opportunity to object to the completeness of the Record. Neither party objected. Accordingly, the Tribunal accepts the Record as complete.

6. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without a hearing or seeking submissions from the other parties or the Director. I find that this appeal is appropriate to be considered under section 114(1) of the *ESA*. After reviewing the appeal submissions, I find it unnecessary to seek submissions from the Employee or the Director. Accordingly, this decision is based on the Determination, the Reasons for the Determination (the "Reasons"), the Appellant's appeal submissions, and my review of the Record that was before the Director when the Determination was made.

## ISSUE

7. The issue before the Tribunal is whether the Director failed to observe the principles of natural justice in making the Determination under section 112(1)(b) of the *ESA*.

## BACKGROUND

### *Facts*

8. Based on a BC Registry search conducted on December 21, 2021, with a currency date of November 8, 2021, Magic Cut Barbers is a sole proprietorship in British Columbia ("BC"), registered on April 17, 2019. Mid Orient Cafe Ltd. is the sole proprietor. Based on a corporate BC Registry search conducted on December 21, 2021, with a currency date of December 14, 2021, Mid Orient Cafe Ltd. was incorporated in BC on January 16, 2017. Ebrahim Al Shihabi ("Mr. Al Shihabi") is listed as the sole director and officer.

9. The Appellant operates a barbershop business (the "Shop") in Fort St. John, BC. The Employee worked as a hair stylist and barber at the Shop from September 8, 2019, to October 29, 2019, when she quit. The Employee received four payments by e-transfer from the Appellant in the total amount of $1,200.00. After the Complaint was filed, the Appellant further made a voluntary payment in the amount of $800.00 on February 7, 2022. There was no written employment agreement. The Employee's rate of pay was also in dispute.

10. On January 21, 2020, the Employee filed a complaint (the "Complaint") at the Employment Standards Branch (the "ESB"). The Employee complained she was owed unpaid wages, tips, and reimbursement for a business expense.

11. Rodney J. Strandberg, a delegate ("Delegate Strandberg") of the Director, received evidence from the Employee and the Appellant during the investigation of the Complaint before the Director made the Determination. I will only set out those aspects of the factual background directly relevant to the issues on appeal.

### *Reasons for Determination*

12. The issues before the Director were:

(1) whether the Employee was an employee (or sub-contractor);

(2) if so, was she a manager;

(3) if so, what was her rate of pay;

(4) if so, was she owed wages; and

(5) if so, was she entitled to be reimbursed for business expenses?

13. The Director noted that the Employee provided the following evidence in the investigation of the Complaint: she was hired to be a barber and run the Shop; she supplied her own tools; between clients, the Employee cleaned, looked for products to sell, and updated the Shop's website; the Employee had ideas about product lines to sell in the Shop, but the Appellant did not allow her to; the Employee did not

have a business license, Canada Revenue Agency account, Goods and Service Tax number, or WorkSafeBC account; when the Employee worked at the Shop, she did not work anywhere else or for anyone else; the Employee was asked by the Appellant to find others to work in the Shop; the Employee had a friend who was interested in working at the Shop, but the Employee had to get the Appellant's permission.

14. The Appellant instructed the Employee to open the Shop from 10 am to 7 pm, and to be available to work during those hours. The Employee had a key to open and close the Shop and worked approximately 10-11 hours per day, for 5 days per week, without formal meal breaks. Mr. Al Shihabi often delivered food to the Shop or alternatively, the Employee visited his restaurant. Sometimes the Employee worked early or late, depending on the clients' needs.

15. The Employee was not involved in budgeting or setting prices. Mr. Al Shihabi often came by, brought supplies, and provided instructions on how to run the Shop. He sometimes allowed the Employee to take money from the till to purchase what she needed. The Employee initially listed herself as a manager in the Complaint, but upon reflection considered herself more of a supervisor who oversaw day-to-day operations.

16. The Employee claimed that Mr. Al Shihabi stated she would be paid $2,000.00 per week. She provided an undated text message in which she stated: "You [Mr. Al Shihabi] said I would get $2000 every two weeks...". The Employee stated she did not keep cash payments from clients or receive cash payments from the Appellant. She was also asked by the Appellant to keep track of her hours and was told she would get paid every two weeks. In October 2019, the Appellant stated that if she wanted to continue to work in the Shop, she would get paid daily. The Employee quit on October 29, 2019, because she was not getting paid. The Employee stated she bought a vacuum to use in the Shop in the amount of $20.00, which she left behind and was not reimbursed for.

17. Mr. Al Shihabi provided evidence on behalf of the Appellant. The Director noted that the Appellant provided the following evidence in the investigation of the Complaint: the Employee was hired to open the Shop, cut hair, make sure the Shop had supplies, and to look after clients. The Appellant did not keep a record of the Employee's hours or take a position with respect to the accuracy of the Employee's records.

18. The Appellant hired the Employee as a subcontractor and agreed to pay the Employee 50% of the revenue she generated from haircuts. An undated text message showed the Appellant responding to the Employee: "From what I know you [the Employee] worked 50 50 of the cuts." The Appellant paid the Employee via e-transfers. Copies of the Appellant's bank account and deposits were provided. However, documents regarding the Shop's daily sales information were not provided. The Appellant claimed to have paid the Employee $360.00 in cash in addition to the $1,200.00 paid by e-transfer. The Appellant believes the Employee kept cash receipts and tips from all haircuts without providing an accounting. The only deposits into the Shop's account were from digital transactions.

19. The Appellant dealt with customer complaints and set prices for the products that were sold in the Shop. The Appellant did not allow the Employee to expand the product line. The Appellant did not know the Employee's friend or hire them. The Employee did not discuss having her friend work at the Shop. The Appellant assumed the Employee's friend was just keeping her company.

20. Mr. Al Shihabi allowed the Employee to use his vehicle and gave her free food from his restaurant. He asked to be credited the value of these benefits to reduce the unpaid wages.

**Employee or Sub-Contractor**

21. The Director noted the definitions of an employer and employee under the *ESA*. An employee includes *a person an employer allows directly or indirectly to perform work normally performed by an employee*. An employer includes *a person who has or had control or direction of an employee or who is or was responsible, directly or indirectly, for the employment of an employee*. The central focus is whether a worker is doing work performed by an employee or by a person in business on their own account. The party that alleges that a worker is not an employee has the onus to prove that burden.

22. The Director found that the Employee worked in the Shop, which was owned or leased by the Appellant, and was under a business name that the Appellant operated. The Appellant set the prices, the Employee's hours, and provided instructions. Mr. Al Shihabi supervised the Employee by dropping by the shop, answering questions, and providing instructions. The Employee had no authority to make changes to the product line sold in the Shop. The Appellant discussed customer complaints with the Employee and personally dealt with them.

23. The Director found that Mr. Al Shihabi, on behalf of the Appellant, exercised discretion and control over the Employee. The Director also found that the Employee's work was performed on behalf of the Appellant at the Appellant's Shop. There was no evidence that the Employee had a business while she worked for the Appellant.

24. Thus, the Director found that the Appellant was an employer under the *ESA* and the Employee was not a sub-contractor but an employee under the *ESA*.

**Manager**

25. The Director noted the definition of a manager under the *ESR*:

> *(a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or*
>
> *(b) a person employed in an executive capacity.*

26. The Director found that it was undisputed that the Employee's only responsibilities were to open the Shop and to look after supplies and clients. She did not direct or supervise other employees for she was the only person working there. She did not have the authority to hire, or the authority to decide which products to purchase and sell, including setting their prices. She also did not have authority to make business decisions, plan, monitor, budget or commit the company's financial resources.

27. Accordingly, the Director found that the Employee was not a manager and was thus not excluded from overtime and statutory holiday pay under the *ESA.*

**Rate of pay**

28. The Director found the text message evidence provided by the parties was insufficient in supporting their respective positions regarding the rate of pay for the messages were undated, provided no corroborating evidence, and simply re-stated each party's position.

29. The Director found no evidence of a $360.00 cash payment made by the Appellant to the Employee, and no evidence of cash payments made by clients to the Employee. The Director found that it was undisputed that the Employee was paid $500.00 on September 21, 2019; $500.00 on October 4, 2019; $100.00 on October 13, 2019; and $100.00 on October 25, 2019.

30. The Director found no correlation between the payments made by e-transfer and the deposits made to the Appellant's bank account for the same period. The electronic deposits from September 11 to October 21, 2019, were in the amount of $2,955.48. The $1,200.00 payments made to the Employee during her employment did not amount to 50% of the deposits. The Director found the Appellant's bank statements unreliable in determining the revenue generated by the Employee and the Appellant's Shop, as a whole. The bank records only included electronic payments made by debit or credit card and excluded days in which the Employee worked, namely, September 8 – 10 and October 26 – 28, 2019.

31. The Director found that even if the agreed upon wage rate was 50% of the revenues, that did not amount to the minimum hourly wage of $13.85 that is required by the *ESA*. Thus, the Director found the Employee's rate of pay was the minimum wage of $13.85 per hour, given there was no reliable evidence to support either party's position.

**Wages**

32. The Director accepted the Employee's record of hours for the Appellant did not keep a record and took no position with respect to the accuracy of the Employee's records. The Director found that the Employee was owed the following: regular wages $3,074.70 + overtime wages $2,139.83 + statutory holiday pay $110.80 + vacation pay $213.01 - minus the $2,000.00 in wages already paid = for a total amount of *$3,583.34* owing.

33. The Appellant asked for deductions to be made from the wages owed based on the value of the meals and vehicle usage that was provided to the Employee. The Director found that under section 20 of the *ESA,* all wages must be paid by cash, cheque, bank draft, money order, or deposited into an employee's account. Thus, payments made in any other manner, including deductions of such a nature, are not valid under the *ESA*.

34. The Director also found that the Employee was entitled to interest in the amount of $262.10 pursuant to section 88 of the *ESA*.

**Business expenses**

35. The Director found there was little evidence and no receipt to support the Employee's claim of purchasing a vacuum for the Shop in the amount of $20.00. There was no evidence the Appellant required this. Thus, the Employee was not entitled to recover $20.00 for this part of her claim.

**Penalties**

36. Section 29 of the *ESR* requires that a mandatory administrative penalty be imposed for each contravention of the *ESA.*

37. The Director noted that section 16 of the *ESA* requires an employer to pay minimum wage prescribed by the *ESR*. The Director found that the Appellant failed to pay the Employee minimum wage throughout her employment. Accordingly, the Director imposed a mandatory $500.00 administrative penalty as of November 5, 2019, when all wages were required to be paid to the Employee.

38. The Director noted that section 18 of the *ESA* requires an employer to pay an employee all final wages within 6 days after they resign. The Employee resigned on October 29, 2019. The Appellant had until November 4, 2019, to pay outstanding wages. Accordingly, the Director found the Appellant contravened section 18 on November 5, 2019, and thus imposed a mandatory $500.00 penalty.

39. The Director noted that section 28 of the *ESA* requires an employer to maintain payroll records, including, the rate of pay, wages paid, and a daily record of hours worked. The Director found that the Appellant contravened section 28 for it did not maintain records, most recently being on October 29, 2019—the Employee's last day. Accordingly, the Director imposed a mandatory $500.00 penalty.

40. The Director noted that section 40 of the *ESA* requires an employer to pay an employee 1.5 x the employee's regular rate of pay for all hours worked over 8 hours per day. The Director found that the Appellant contravened section 40 for it did not pay the Employee over-time pay, with the most recent contravention being November 5, 2019. Accordingly, the Director imposed a mandatory $500.00 penalty.

41. The Director noted that section 45 of the *ESA* requires an employer to pay an employee an average days' work for each statutory holiday, provided they have worked for least 15 days in the 30 calendar days preceding the statutory holiday. Section 46 requires an employer to pay an employee, who works on a statutory holiday, 1 ½ times their regular wage rate for all hours worked, up to 12 hours, on that day. The Director found that the Appellant contravened section 45 for there was no evidence that the Appellant paid any statutory holiday pay, most recently being on the pay period of October 1 – 15, 2019, for section 17 of the *ESA* requires an employer to pay all wages earned in a pay period no later than 8 days after the end of the pay period. Accordingly, the Director imposed a mandatory $500.00 penalty.

42. The Director noted that section 58 of the *ESA* requires an employer to pay an employee at least 4% of the employee's total wages as vacation pay if they have been employed for 5 or less years. The Director found that the Appellant contravened section 58, however, the contravention was subsumed by section 18. Accordingly, the Director did not impose any penalty.

## ARGUMENTS

43. The Appellant appeals the Determination alleging that the Director failed to observe the principles of natural justice in making the Determination.

44. The Appellant submits that the Director's decision is illegal, unlawful, and uncalled for. The Appellant submits the same facts it already testified to during the investigation of the Complaint. I will not be

reproducing those facts here, but briefly, the Appellant reargues facts regarding the Employee being hired as a subcontractor, there being no unpaid wages, and the scope of the Employee's employment and remuneration.

45. The Appellant submits that Delegate Strandberg "pushed" the Appellant back and forth for four months and attempted to "hustle" the Appellant into paying the Employee more wages. Specifically, the Appellant was recommended to pay $800.00 during a phone conversation, so the total amount paid would amount to $2,000.00. The Appellant believed that making an additional payment would conclude the matter.

46. The Appellant submitted bank statements and copies of e-transfers, some of which can be found in the Record, and that it previously provided to Delegate Strandberg during the investigation of the Complaint. It also submitted a wage calculator sheet found in the Determination.

**ANALYSIS**

47. Section 112(1) of the *ESA* allows a party to appeal a determination on 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.

48. Section 114(1) 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 any 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 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;

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

49. The Tribunal has consistently held that an appeal is not another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, and the burden is on the appellant to persuade the Tribunal that there is an error in the determination under one of the statutory grounds of review in section 112(1).

50. In this case, the Appellant appeals the Determination on the basis that the Director failed to observe the principles of natural justice in making the Determination. I am not persuaded with the merits of the grounds of appeal. Accordingly, I dismiss the appeal for the reasons set out below.

**Principles of Natural Justice**

51. Natural justice is a procedural right that includes the right to know the case being made, the right to respond, the right to know about the hearing process, and the right to be heard by an unbiased decision maker (*Re 607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05; *Imperial Limousine Service Ltd.*, BC EST # D014/05). The party alleging failure to comply with natural justice must provide evidence in support of the allegation (*Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99).

52. There is nothing in the Record showing that Delegate Strandberg failed to comply with the principles of natural justice in conducting the investigation. The Record shows that Delegate Strandberg communicated to the Appellant several times about the application of the *ESA* and the likely outcome of this case. In an email dated October 8, 2021, Delegate Strandberg stated that the Appellant was required to keep records which it did not. As a result, the Employee's records would likely be accepted. Furthermore, the Appellant's position regarding the subcontractor relationship and payment arrangement would likely not be accepted if the matter went to the Director. Delegate Strandberg also set out a tentative calculation of the wages owing, using minimum wage, and advised about the number of penalties that would likely be imposed.

53. On November 4, 2021, Delegate Strandberg emailed the Appellant with the Employee's proposal to resolve the matter in exchange of $3,501.30, again, setting out the number of $500.00 penalties that would be imposed for contravening the *ESA* if the matter went to the Director. The Appellant was strongly advised to seriously consider resolving the Complaint.

54. Thereafter, the Record shows several emails and phone calls were exchanged in connection with resolving the Complaint, but to no avail. On December 3, 2021, Delegate Strandberg emailed the parties about a resolution and set out the advantages of resolving a complaint. Namely, there being no penalties imposed on the Appellant if contraventions of the *ESA* are found. Delegate Strandberg explained that if no voluntary resolution was reached, they would complete an investigative report, which would go to the Director. This was reiterated again in an email on January 11, 2022, along with a reminder of the imposition of penalties.

55. The Record shows that the parties were not able to resolve the matter, and in particular, the Appellant may have had a change of heart in early January. On January 4, 2022, Delegate Strandberg sent the Appellant instructions regarding the information they would need to initiate a settlement proposal; however, the Appellant provided a nonresponsive email in response to the information requested. On January 19, 2022, Delegate Strandberg spoke to the parties about a possible $800.00 payment. On January 25, 2022, Delegate Strandberg emailed the Appellant with the Investigative Report and asked for a response by February 8th, confirming that the Investigative Report would be sent to the Director for a determination. The email also confirmed that if the Appellant wished to make a voluntary payment in early February, as it indicated it might, to please provide details. On February 10, 2022, Delegate Strandberg emailed the parties confirming the $800.00 payment made by the Appellant and received by

the Employee. Delegate Strandberg reiterated that the Investigative Report would be going to the Director on February 11th to make a final decision about the Complaint.

56. I find that Delegate Strandberg did their due diligence in providing the Appellant opportunities to respond, to resolve the Complaint, and considered the Appellant's testimony and evidence. I do not find that the Appellant was pressured in any way to resolve the Complaint or make an $800.00 payment. Many of the initial emails sent by Delegate Strandberg had typical boiler plate information for the parties' information, which included information about resolutions, the likelihood of success, and imposition of fines. Based on the Record, I find that it would have been in the best interests of the Appellant to resolve the matter when it had the opportunity to do so.

57. I find that the Appellant should have reasonably known that the matter would be going to the Director for a determination because it did not voluntarily resolve the matter. There is nothing in the Record that shows that the $800.00 payment was initiated to resolve the matter. The Record shows that the Appellant had ample notice and numerous reminders throughout the investigation of the Complaint about the terms needed to reach a settlement, about the Investigative Report going to the Director if there was no resolution, the high likelihood of its position not being accepted, and the imposition of fines. The email of January 25, 2022, made it clear that the Investigative Report would be going to the Director, even if the Appellant made a voluntary $800.00 payment in early February.

58. A breach of natural justice can occur when a delegate's reasons fail to reconcile inconsistent evidence from the same party (*Re De Buen,* BC EST # D025/12). A determination that a delegate has failed to consider relevant evidence involves an assessment of both the reasons given by the delegate for making a determination, and an analysis of the issue to which the evidence is relevant (*Re Welch (c.o.b. Windy Willows Farm),* BC EST # D161/05).

59. The Director's Reasons show that the Appellant's evidence was considered but dismissed because the Appellant did not keep a record of the Employee's hours, did not provide business records or evidence regarding the revenue generated by the Employee or the Shop, or other documents showing the sub-contractor relationship with the Employee.

60. As a result, I find that the Director did not breach the principles of natural justice in their assessment of the evidence, for they reconciled a lack of evidence and considered the evidence that was before them—it was just not in favour of the Appellant. Considering the Director's findings about the subcontractor relationship and managerial role, the Director correctly imposed minimum wage as the Employee's rate of pay.

61. I find that the Director's findings are reasonable, account for the evidence that was and was not produced, and are well supported by the evidence that was before them. Thus, I find that the Director did not breach the principles of natural justice.

62. Accordingly, I dismiss the appeal.

**ORDER**

63. The appeal is dismissed under section 114(1)(f) of the *ESA*. Pursuant to section 115(1) of the *ESA*, the Determination dated March 16, 2022 is confirmed, together with any interest that has accrued under section 88 of the *ESA*.

**Mona Muker**
**Member**
**Employment Standards Tribunal**