Citation: Bloo BBY Restaurant Ltd. (Re)
2023 BCEST 56

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Bloo BBY Restaurant Ltd.

– of a Determination issued by –

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2023/037

DATE OF DECISION: July 26, 2023

DECISION

SUBMISSIONS

Faegheh Shariatmadar — on behalf of Bloo BBY Restaurant Ltd.

OVERVIEW

1. This is an appeal filed by Bloo BBY Restaurant Ltd. ("appellant") pursuant to section 112(1) of the *Employment Standards Act* ("*ESA*"). The appeal concerns a Determination issued by Michael Thompson, a delegate of the Director of Employment Standards ("delegate"), on February 16, 2023, pursuant to which the appellant was ordered to pay two of its former employees ("complainants") the total sum of $25,661.19. The delegate issued his "Reasons for the Determination" ("delegate's reasons") concurrently with the Determination.

2. Further, and also by way of the Determination, the delegate levied four separate $500 monetary penalties against the appellant (see section 98 of the *ESA*) based on its contraventions of sections 17 (failure to pay wages at least semimonthly), 18 (payment of all earned wages on termination of employment), and 30.3 (unlawful dealing with gratuities) of the *ESA*, and section 46 of the *Employment Standards Regulation* (failure to produce or deliver employment records following a lawful demand). Accordingly, the appellant's total liability under the Determination is $27,661.19.

3. The appellant bases its appeal on all three statutory grounds, namely, the delegate erred in law and failed to observe the principles of natural justice in making the determination and also on the basis that it now has relevant evidence not previously available (see sections 112(1)(a), (b) and (c) of the *ESA*).

4. In my view, this appeal is wholly without merit and must be dismissed under section 114(1)(f) of the *ESA*. My reasons for reaching that conclusion now follow.

PRELIMINARY MATTERS

5. As noted above, the Determination and the delegate's accompanying reasons were both issued on February 16, 2023. The deadline for appealing the Determination, set out in a text box on page D4 of the Determination, and calculated in accordance with sections 112(3)(a) and 122(2) of the *ESA*, was March 27, 2023 by 4:30 PM.

6. On March 27, 2023, at 4:10 PM, the appellant's present representative, Faegheh Shariatmadar (who is the appellant's sole director), sent a brief e-mail to the Tribunal in which she stated: "Here is our appeal for the complaints made against Bloo BBY Restaurant LTD." Ms. Shariatmadar attached copies of several screenshots of text messages, all dated in late January 2020, to this electronic communication. She also attached an Appeal Form in which she identified herself as the appellant, and a 4-page memorandum setting out the reasons for the appeal. In the Appeal Form, Ms. Shariatmadar indicated that she was appealing a determination based on all three statutory grounds of appeal and would be filing further documents by March 31, 2023. Although indicating in her Appeal Form that she had attached a copy of

the Determination (but not the delegate's reasons), I understand that a complete copy of the Determination (albeit not entirely legible) was actually first delivered to the Tribunal on March 28, 2023.

7. In response to a request from the Tribunal, Ms. Shariatmadar indicated that the appeal was intended to be filed on behalf of the present appellant, Bloo BBY Restaurant Ltd. In the circumstances, I am of the view that the misidentification of the actual intended appellant in the Appeal Form is a technical irregularity that can be ignored by reason of section 123 of the *ESA*. Despite the fact that this appeal was not, in fact, perfected as required by section 112(2) of the *ESA* by the March 27, 2023 deadline, I am not treating this as a late appeal (even though, strictly speaking, it is) because, in light of my view regarding the merits of this appeal, there is no need to consider whether the appeal period should be extended under section 109(1)(b) of the *ESA*.

THE DETERMINATION

8. The appellant operates a "hookah lounge" in Burnaby. The two complainants ("CT" and "EJ"), who worked as servers at the lounge, filed complaints under section 74 of the *ESA*. Both complaints essentially set out the same allegations, namely, that they were not paid, on a regular basis, their earned wages, and never received any monies on account of gratuities provided by the appellant's clients. EJ worked for the appellant for 2 months in fall of 2019; CT worked for the appellant in two separate stints spanning the period from June 2019 to March 2020.

9. In her complaint, CT identified "Bloo bby lounge" as her employer and "Dino" as the owner of the business. EJ identified "bloo hookah lounge" as his employer and "dino" as the business owner.

10. The Determination was issued against both Bloo BBY Restaurant Ltd. and Bloo Hookah Lounge Ltd., companies incorporated and registered to carry on business in British Columbia. The delegate made a section 95 "associated employers" declaration against both corporations. The effect of that declaration is to make both corporations "jointly and separately liable for payment of the amount stated in a determination". The delegate's reasons set out, at page R5, his justification for making the section 95 declaration:

> While the evidence is admittedly limited, this [is] due to Bloo BBY and Bloo Hookah's nonexistent or very limited participation in the investigations conducted. I find that Bloo BBY and Bloo Hookah should be associated pursuant to section 95 of the Act for the following reasons. Firstly, I reject Mr. Zarrinsar's [the son of Bloo Hookah's sole director] evidence that his mother and he had nothing to do with the Burnaby lounge. As detailed above, both legal entities were incorporated by his mother, who was a director of both legal entities during the period of the Complainants' employment. Each of Bloo BBY and Bloo Hookah operated hookah lounges in somewhat close proximity, and with very similar names. At the time the Complainants were employed, an individual who I find was Mr. Zarrinsar's mother, was a director of both Bloo BBY and Blooo Hookah. This same individual, Shahnaz Hedayati Javan or Javan Hedayati, incorporated both legal entities. I find that Bloo BBY and Bloo Hookah were operating under common direction and control at the time of the Complainants' employment. Finally, I find that given the spotty operating history of the hookah lounges, Bloo BBY and Bloo Hookah should be associated to maximise the chance that the Complainants' wages are able to be collected. I will hereafter refer to Bloo BBY and Bloo Hookah collectively as the Employer.

11. As noted above, this appeal has been filed solely on behalf of Bloo BBY Restaurant Ltd. and, in its appeal documents, the appellant does not challenge the section 95 declaration. Accordingly, I do not propose to address this particular matter any further. Simply for the sake of completeness, however, I will note that I am satisfied that the section 95 declaration was properly issued in this matter (see *San Bao Investment Inc.*, BC EST # D017/17, regarding the principles governing section 95 declarations).

12. During the course of the Employment Standards Branch investigation into the complaints, the appellant made no meaningful effort to participate in the investigation. The delegate's reasons state, at pages R3-R4:

> The Investigating Delegate made multiple attempts to contact Bloo Hookah through his initial investigation by telephone and by regular and registered mail to the business address, registered and records office, and the sole director's address on the BC Registry documents. The Investigating Delegate sent copies of the complaint forms and letters advising Bloo Hookah of the investigation and requesting participation with no response.
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> On June 4, 2021, the Investigating Delegate reached Dino by telephone, who identified himself as Dino Benzo (hereafter Mr. Benzo). Mr. Benzo requested the Investigating Delegate call him back after 2:00 pm that day, which the Investigating Delegate did; Mr. Benzo did not answer that call, and the Investigating Delegate was unable to contact him again during the investigation.
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> On June 14, 2021, the Investigating Delegate sent a Demand for Employer Records (the Bloo Hookah Demand) to the address indicated as Bloo Hookah's registered and records and director's office by registered mail, requiring Bloo Hookah to provide payroll records for the Complainants no later than 4:30 pm on June 30, 2020. The Demand was returned unclaimed, and Bloo Hookah provided no records in response.
>
> As noted above, I issued determinations against Bloo Hookah on December 14, 2021, and against Javan Hedayati as its director on September 6, 2022, which were subsequently cancelled on September 22, 2022.
>
> In the subsequent investigation, the Investigating Delegate sent a further Demand for Employer Records to Bloo BBY (the Bloo BBY Demand) but received no response. Bloo BBY has provided no information during the investigation.
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> Mr. Zarrinsar on behalf of Bloo Hookah indicated that he runs a hookah lounge in Port moody, and has no knowledge of the lounge in Burnaby. His mother, Bloo Hookah's sole director Javan Hedayati, and he have not been involved with Bloo BBY in any way. Mr. Zarrinsar provided no further information to the investigating Delegate.

13. In light of the abject failure of either corporation to meaningfully participate in the investigation, the delegate proceeded to issue unpaid wage orders against both corporations based on the evidence provided by the complainants. The delegate's reasons on this point (at page R5) are as follows:

> …the Delegate attempted on multiple occasions and through multiple avenues to obtain information from the Employer, with no success. Documents including the Demand and the IR have been served on each legal entity pursuant to section 122 of the Act. I find that the Employer has been provided with a reasonable opportunity to participate in the investigation of the Complainants' allegations, but has declined to do so. As a result, I find that the Complainants' evidence is the best available as to their hours of work and wages earned, as detailed in the attached summary sheets.

14. The delegate's reasons include a separate "Wage Calculation Summary" for each complainant. EJ was awarded about $7,700 on account of unpaid regular wages (over 2/3 of his total unpaid wage award), overtime pay, statutory holiday pay, vacation pay, and section 88 interest. The delegate did not make an award on account of withheld gratuities finding "there is insufficient evidence to indicate that [EJ] earned any tips which were subsequently withheld." CT was awarded nearly $18,000 in unpaid wages including regular wages (nearly 90% of her total unpaid wage award), statutory holiday pay, compensation for length of service (1 week's regular wages), vacation pay, and section 88 interest. Her claim for withheld gratuities was dismissed, the delegate holding (at page R11):

> [CT's] undisputed evidence was that she was required to pool her tips in the expectation that they would be redistributed, but that she never received any distribution. I find that the Employer did pool her gratuities, a practice which is allowed under section 30.4 of the Act, but that it did not redistribute the monies collected as required by that section. [CT] provided no evidence or even estimate of the amount of tips she earned during her employment. I therefore find that there is insufficient evidence to award her repayment of any withheld gratuities.

REASONS FOR APPEAL

15. As noted above, the appellant bases its appeal on all three statutory grounds. However, the appellant's 4-page memorandum does not explain, in even the most rudimentary fashion, how or why the delegate erred in law or failed to observe the principles of natural justice. Further, although the appellant attached several documents to its Appeal Form, it has not explained why these documents would be admissible as "new evidence" under the *Davies et al.* test (see BC EST # D171/03).

16. The appellant's reasons for appeal include many assertions that are both irrelevant and not probative in terms of the issues before me on this appeal. For example, it says that CT was attempting to perpetrate a fraud in terms of the federal government's emergency response benefit program ("CERB"), and that "she has a track record of…being involved in many criminal activities". With respect to EJ, it says that he was never "entitled to the tip pool"; however, the delegate did not make any award in favour of EJ with respect to withheld gratuities. It also advances wholly unsubstantiated allegations against EJ that he is a thief, and that he owes the appellant monies on account of unpaid rent relating to housing that it says it provided him.

17. The appellant says, with respect to both complainants, that their unpaid wage claims are largely, if not entirely, fabricated.

FINDINGS AND ANALYSIS

18. As noted above, the appellant has not particularized, in even the most cursory fashion, its asserted grounds of appeal. That said, I will nonetheless address each ground based on the material that is before me. I will separately address each statutory ground of appeal in turn, commencing with the "new evidence" ground of appeal.

New Evidence

19. Section 112(1)(c) of the *ESA* states that an appeal may be based on "evidence [that] has become available that was not available at the time the determination was being made". As noted above, the appellant

appended several documents to its Appeal Form, namely, copies of screen shots of text messages. These documents are dated in January 2020, and thus were "available" when the Determination was being made (the Determination was issued in February 2023). If the appellant had not decided to, essentially, completely ignore the many requests from the Employment Standards Branch for information, these documents could have been submitted to, and considered by, the delegate. Apart from that fatal failing, these text messages are largely, if not entirely, irrelevant to the issues properly before me in this appeal.

Natural Justice

20. I have reproduced, above, an excerpt from the delegate's reasons that details the efforts made by the Employment Standards Branch to obtain evidence and argument from the appellant (but to no avail). My review of the section 112(5) record indicates that the appellant ignored at least nine separate letters and telephone messages from representatives of the Employment Standards Branch prior to the Determination being issued. Quite simply, the appellant was given a more than fair opportunity to respond to the two complaints, consistent with section 77 of the *ESA*. There is no merit whatsoever to the appellant's apparent position that there was a breach of the principles of natural justice in this case.

Error of Law

21. Placing the appellant's submissions in their most favourable light, it could perhaps be argued that the appellant is saying the delegate erred in law by making unpaid wage orders in favour of the complainants in the absence of a proper evidentiary foundation (because the complainants were "liars"). I note, however, that the appellant's position that the complainants were untruthful is, essentially, a bald assertion without a proper evidentiary justification. In any event, a finding of fact made without a proper evidentiary foundation can be characterized as an error of law if, for example, the factfinder was "acting without any evidence", or was "acting on a view of the facts which could not reasonably be entertained" – see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466, [1998] B.C.J. No. 2275, 112 B.C.A.C. 176, 62 B.C.L.R. (3d) 354, 82 A.C.W.S. (3d) 1065 (BCCA).

22. The *only* evidence before the delegate regarding the hours worked by the complainants was that provided by the complainants themselves. The appellant was ordered to produce payroll records but refused to do so (and thus was subject to a $500 monetary penalty which it does not now challenge). It appears that the appellant may not have kept any proper employment records for the two complainants. Although the complainants did not have any records of their hours of work (and, it should be noted, they have no obligation under the *ESA* to keep and maintain such records), they both provided consistent testimony regarding their work schedules and hours of work. Their evidence in this latter regard was entirely uncontradicted. Thus, the delegate proceeded to make unpaid wage payment orders based on the best – and only – evidence available. In so doing, the delegate did not, in my view, err in law.

23. To summarize, I am not satisfied that the delegate erred in law or failed to observe the principles of natural justice in making the Determination. The so-called "new evidence" submitted by the appellant is neither new nor particularly relevant, and could have been provided to the Employment Standards Branch had the appellant deigned to meaningfully participate in the investigation. The documents appended to the appellant's Appeal Form are not admissible under the *Davies et al.* test.

24. This appeal has no reasonable prospect of succeeding and, that being the case, must be dismissed under section 114(1)(f) of the *ESA*.

ORDER

25. Pursuant to section 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA* the Determination is confirmed as issued in the total amount of $27,661.19 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal