

An appeal

- by -

Emmanuel's House of Dosas Inc.  
(“Emmanuel’s”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2010A/150

**DATE OF DECISION:** January 11, 2011

## DECISION

### SUBMISSIONS

Thomas F. Beasley	Counsel for Emmanuel's House of Dosas Inc.
Jayasankar Jayaraman	on his own behalf
Kristine Booth	on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the "*Act*") by Emmanuel's House of Dosas Inc. ("Emmanuel's") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 13, 2010.
2. The Determination was made in respect of a complaint filed by Jayasankar Jayaraman ("Jayaraman"), who alleged Emmanuel's had contravened the *Act* by failing to pay regular wages, annual holiday pay and length of service compensation.
3. The Determination found that Emmanuel's had contravened Part 3, section 18, Part 4, section 40, Part 5, section 45, Part 7, section 58 and Part 8, section 63 of the *Act* and ordered Emmanuel's to pay Jayaraman an amount of \$18,245.33, an amount which included wages and interest.
4. The Director also imposed administrative penalties on Emmanuel's under Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of \$1,500.00.
5. The total amount of the Determination is \$19,745.33.
6. In this appeal, Emmanuel's says the Director erred in law and failed to observe principles of natural justice in making the Determination and seeks to have the Determination referred back to the Director.
7. The Tribunal has discretion whether to hold an oral hearing on an appeal. None of the parties has sought an oral hearing before the Tribunal and we have decided an oral hearing is not necessary in this case. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

### ISSUE

8. The issues are whether the Director erred in law or failed to observe principles of natural justice in making the Determination.

### THE FACTS

9. Emmanuel's operates a restaurant in Vancouver. The Director found Jayaraman worked for Emmanuel's as an employee for a period from January 1, 2009, to September 8, 2009, when he was terminated by Jayakumar J. Muttavanchery ("Muttavanchery"), the principle owner of Emmanuel's.

10. Jayaraman alleged that Emmanuel's had failed to pay him wages and vacation pay during his employment and had terminated his employment without cause, notice or compensation in lieu of notice.
11. The Determination contains a section identified as "Opportunity to Respond", which sets out the communications with Emmanuel's and Muttavanchery concerning Jayaraman's claim and efforts to elicit a response from Emmanuel's. The Director's chronology of those efforts and the result of those efforts are as follows:
  1. A telephone call to Emmanuel's in which Muttavanchery was advised of Jayaraman's allegations and a mediation session scheduled;
  2. A scheduled mediation session which Muttavanchery failed to attend. Efforts to contact him yielded the information he had left Vancouver and would not be returning for two months;
  3. An April 29, 2010, letter from the Director to Emmanuel's registered and records office, with a copy to an email address the Branch had for Emmanuel's, outlining Jayaraman's claims, enclosing a demand for employer records and inviting a response to the claims and production of the employer records by May 14, 2010;
  4. A June 8, 2010, telephone conversation with Muttavanchery, during which he confirmed receipt of the April 29 correspondence. He assured the Director a response would be submitted by June 15, 2010. No response was received by the Director by that date.
  5. An email received by the Director on June 17, 2010 from Muttavanchery explaining his restaurant had been robbed, but that he still intended to respond to Jayaraman's claims. Efforts to contact Muttavanchery to discuss a date for submitting the response were unsuccessful. The Director requested Muttavanchery contact the Director to discuss an extension for responding. No contact was made.
  6. An email message was sent to Muttavanchery on June 18, 2010, advising him he had until June 25, 2010 to file a response.
  7. A June 23, 2010 telephone call from Muttavanchery to the Director advising he was dealing with the break in but would deliver the response by June 25, 2010;
  8. An email to the Director from Muttavanchery on June 25, 2010 indicating that he and his legal counsel were gathering evidence and to "please bear with him". He also indicated to the Director he knew people who could provide evidence to support Emmanuel's position. The Director responded the same day by email, advising no further extension would be granted.
  9. A letter sent by the Director to Emmanuel's by email on June 29, 2010, and by registered mail the following day setting out evidence provided by four persons who had been interviewed by the Director and gave Emmanuel's until July 7, 2010, to respond to this evidence.
  10. A voice message from legal counsel for Emmanuel's received by the Director on July 7, 2010, that was answered by the Director the next day. During the ensuing discussion, legal counsel presented argument on behalf of Emmanuel's and explained that Muttavanchery did not feel comfortable communicating in English. Legal counsel requested an extension until August 13, 2010 to reply. The Director allowed an extension to July 19, 2010.
  11. An email provided to the Director on July 15, 2010, responding to the statements provided by the witnesses, along with the names and telephone numbers of two people who would provide evidence to support Emmanuel's arguments.

12. A July 23, 2010, letter from the Director, setting out the preliminary findings on the matter of Jayaraman's status as an employee under the *Act* and requesting a copy of the point of sale system records. There was no response to the letter nor was there any further response from Muttavanchery or on behalf of Emmanuel's before the Determination was issued.
12. The Director made the following findings of fact: Jayaraman was an employee of Emmanuel's for a period from January 1, 2009, to September 8, 2009; that, except for a period of illness, most weeks Jayaraman worked six days a week, 10 hours a day during his employment; that Emmanuel's agreed to pay Jayaraman wages of \$3,000.00 a month; the statutory recovery period was limited to a period from March 8, 2009, to September 8, 2009; and that Jayaraman was entitled to wages overtime wages, annual holiday pay, statutory holiday pay for five statutory holidays and length of service compensation.
13. The Director reached the following conclusion on the facts:

. . . Emmanuel's was made aware of the Complainant's claim on numerous occasions and in a number of different ways. Additionally, Emmanuel's responded to the allegations, albeit not as fully as Mr. Muttavanchery indicated he would, in both telephone conversations and email messages. I find the Director, by way of his Delegate, fulfilled the obligation set out in section 77 of the *Act*. Emmanuel's was advised of the complaint allegations, invited to participate in the investigation, accommodated by way of multiple extensions, and given the opportunity to respond to the claims made against it.

## ARGUMENT

14. Counsel for Emmanuel's has alleged the Director erred in law and failed to observe principles of natural justice in making the Determination. The appeal contains twelve points that particularize the errors which are alleged. Without setting out each point, the elements of the appeal relate to the allegations that Emmanuel's was not afforded an opportunity to challenge evidence provided to the Director and was not given a reasonable opportunity to know the case it had to meet or to be heard, that the Director failed to conduct a proper investigation, failed to properly assess the evidence, failed to make reasonable efforts to contact Emmanuel's, failed to make Emmanuel's aware of the evidence acquired or provide it with an opportunity to challenge the evidence given by, and on behalf of, Jayaraman and failed to conduct an oral hearing. Much of the appeal relates to the Director having conducted an investigation of the complaint, rather than an oral hearing on the complaint, and having acquired most of the evidence in telephone conversations with persons whose names were given to the Director as prospective witnesses for one party or the other.
15. Counsel for Emmanuel's argues that substantial differences in the evidence provided by Jayaraman and Emmanuel's demanded an oral hearing.
16. Jayaraman and the Director have filed replies to the appeal.
17. Jayaraman opposes the appeal. He disagrees with the suggestion that Emmanuel's and Muttavanchery were not aware of his claim or of the evidence the witnesses provided. He points out that Muttavanchery was in Vancouver until July 27, 2010, when he and his wife flew to India, and fully participated in the complaint process. He denies many of the claims made by counsel for Emmanuel's in the appeal.
18. The Director has responded to each of the points made in the appeal. Once again, without setting out in detail each response, it will suffice to say the Director disagrees with the allegations made in the appeal. Much of the response of the Director directs the Tribunal to parts of the Determination which, the Director says, show Emmanuel's and Muttavanchery were aware of the claim, were provided with an opportunity to respond to it, were provided with a summary of the evidence of witnesses before the Determination was

issued and were given an opportunity to respond to that evidence and to provide its own witnesses. The Director says a reasonably objective assessment of the evidence given by the witnesses was made and, where the evidence differed, reasons were provided in the Determination for accepting one person's evidence over another's.

19. The Director notes that the allegation of “ulterior motives” and collusion were considered against the facts, addressed in the Determination and rejected for lack of supporting evidence.
20. The Director concedes that the evidence considered in making the Determination was gathered from the parties and the witnesses by phone and through written submissions, but says all of the evidence provided was given to the parties for their response and was evaluated and weighed in making the Determination. The Director says both of the parties provided names and telephone numbers of persons to contact and neither complained about the investigation process at the time or requested an oral hearing on the complaint.
21. In his final reply, counsel for Emmanuel's confirms Muttavanchery was in India after July 29, 2010, but says that does not change his position about the propriety of the investigation or the need for an oral hearing.

## ANALYSIS

22. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

*112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more 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 made.*

23. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
24. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
25. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
  1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and

5. adopting a method of assessment which is wrong in principle.

26. I will first address the natural justice arguments made by counsel for Emmanuel's. As indicated above, a party asserting a failure to observe principles of natural justice bears the burden of establishing such a breach and Emmanuel's has not met that burden. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal has briefly summarized the natural justice concerns that typically operate in the context of this ground of appeal:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWT Business World Incorporated*, BC EST #D050/96.

27. Counsel for Emmanuel's has partially grounded the natural justice issue on an alleged failure by the Director to provide Emmanuel's with the above described procedural rights. However, the material in the section 112(5) Record and the Determination do not support this allegation. Rather, the material indicates that in every respect Emmanuel's was provided with the opportunity required by section 77 of the *Act* and the principles of natural justice to know the case it had to meet, present its position, including evidence to support that position, and to respond to the position presented by Jayaraman and the evidence provided in support of that position. The fact that Emmanuel's appears not to have been particularly responsive to the requests of the Director and the demands of the process does not amount to a breach of section 77 or the principles of natural justice.

28. To a large extent, the matters about which Emmanuel's complains were self inflicted. Emmanuel's was provided with the particulars of Jayaraman's claim and a Demand for Employer Records on April 29, 2010; it was allowed extensions of time to provide a response and meet the Demand; it was provided with a summary of the evidence of four persons on June 29, 2010, and given an opportunity to respond; it was provided with an opportunity to provide its own evidence in support of its position; it was provided with the preliminary finding on Jayaraman's employment status on July 23, 2010 and invited to respond. I agree with the point made by Jayaraman that by the time Muttavanchery left for India, the complaint investigation had been completed.

29. The other aspects of the appeal combine error of law and a natural justice issue that relate to the process chosen by the Director for dealing with the complaint, specifically, the decision of the Director to conduct an investigation of the complaint, rather than hold an oral hearing and the process by which the Director gathered evidence from witnesses.

30. At the outset of the analysis on this argument, I will echo the view I took in *Jennifer Oster*, BC EST # D120/08, of this kind of argument: that following amendments to the *Act* in May 2002, the *Act* now appears to provide the Director with a level of discretion about whether to conduct an investigation and does not direct how an investigation is to be conducted. The decision of the Director about the complaint process is not *per se* open to challenge on natural justice grounds. There may well be a failure to observe principles of natural justice within the complaint process selected by the Director, but that would be substantially different than there being a breach arising directly from the process chosen and would have to be established on objective evidence. Accordingly, the decision of the Director to investigate rather than conduct a hearing on the complaint does not indicate in any way a breach of natural justice.

31. I have already decided the Director did not deny the procedural rights required in section 77 of the *Act* and principles of natural justice, as expressed in *Imperial Limousine Service Ltd., supra*, within the process chosen for administering the complaint. I am not convinced that interviewing witnesses by telephone – rather than in person or by requiring sworn affidavits – or not holding an oral hearing affects that conclusion. In dealing with arguments of this sort, the Tribunal has been alert to the objects of the *Act* as socially beneficial legislation, the stated purpose of the *Act* - to provide fair and efficient procedures for resolving disputes under the *Act* – and, on a more pragmatic note, the potential consequences of compelling the Director to adopt procedures that might unnecessarily judicialize the process. In that context, I adopt the following comment by the Tribunal in *Milan Holdings Ltd.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97), at p 12:

The office of Director is unique, significant and central to the effectiveness of the *Employment Standards Act*. Under Part 10 of the *Act*, the Director is given a series of quintessential investigative powers. The Director may enter and inspect premises: s. 85. She may, with or without complaint, investigate a person to ensure compliance with the *Act*: s. 76. She may receive confidential information: s. 75. The Director's *Inquiry Act* powers extend to this investigative role: s. 84.

An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77, which requires only that “If an investigation is conducted, the director must make reasonable efforts to a give a person under investigation an opportunity to respond”.

32. While some aspects of the above comment have been affected by amendments to the *Act*, the general tenor of the comment has not: the Director has discretion over the process chosen to administer complaints which, subject to the requirements of section 77 and principles of natural justice, will not be supervised by the Tribunal.
33. The arguments made by counsel for Emmanuel's have not persuaded me that the process adopted by the Director denied Emmanuel's the procedural protection required by the *Act* or breached the principles of natural justice. The process chosen by the Director in this case is consistent with the provisions of the *Act* allowing the Director to investigate complaints in the “informal, flexible and dynamic fashion” contemplated within the investigative process.
34. Finally, I do not accept a hearing was required because Emmanuel's had made an allegation of collusion and ulterior motives by Jayaraman; it was a bare allegation without a shred of evidence to support it. The Director considered the allegation in the Determination and rejected it for lack of evidence.
35. The appeal is dismissed.

**ORDER**

36. Pursuant to section 115 of the *Act*, I order the Determination dated September 13, 2010, be confirmed in the amount of \$19,745.33, together with any interest that has accrued under Section 88.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**