



An appeal

- by -

0777746 B.C. Ltd. carrying on business as Mama Z's Jade Boulder Cafe
(“Mama Z'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: Carol L. Roberts

FILE No.: 2012A/128

DATE OF DECISION: January 23, 2013

DECISION

SUBMISSIONS

Fred Wynne, Hamilton Howell Bain & Gould on behalf of 0777746 B.C. Ltd. carrying on business as
Mama Z's Jade Boulder Cafe

OVERVIEW

1. This is an appeal by 0777746 B.C. Ltd. carrying on business as Mama Z's Jade Boulder Cafe ("Mama Z's"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued October 1, 2012, as it relates to Salvatore Zaccaro ("Mr. Zaccaro"), whom the delegate found was entitled to wages and interest in the amount of \$10,386.91.
2. In that Determination, the Director found that Mama Z's had contravened sections 17 and 18 of the *Act* in failing to pay all wages owing to five of its former employees. The Director found a total of \$29,271.44 in wages and interest payable to the employees. The Director also imposed two \$500 administrative penalties for the contraventions, for a total amount payable of \$30,271.44.
3. Counsel submits that the delegate failed to comply with the principles of administrative justice and that evidence was not available at the time the Determination was being made because the delegate failed to contact the Employer and failed to make reasonable steps to contact the Employer.
4. Section 114 of the *Act* and Rule 22 of the Tribunal's *Rules of Practice and Procedure* (the "*Rules*") provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
5. These reasons are based only on Mama Z's written submissions, the Section 112(5) "record" that was before the delegate at the time the decision was made and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under Section 114 (1) of the *Act*, the Respondent and the delegate may be invited to file further submissions. If the appeal is not meritorious it will be dismissed.

FACTS AND ARGUMENT

6. Mama Z's is a restaurant. The five employees filed complaints alleging that Mama Z's had failed to pay all wages earned. As the restaurant operated intermittently during the course of the investigation, the Employer was out of regular contact. The Director's delegate noted that, based on various sources, the Employer was alleged to have been operating another restaurant but efforts to contact her were unsuccessful. As a result, the investigation was "extended over an abnormally long period". The Employer made detailed written submissions to the delegate with respect to all of the complainants except Mr. Zaccaro.
7. Mr. Zaccaro advised the delegate that he was hired as the Executive Chef at Mama Z's in late January 2011 at a salary of \$3,200 per month. He stated that although he worked from January 20, 2011, until May 27, 2011, he never received his regular monthly wage. He said that, instead, he received the amount of \$1,800 cash from Zora Ivanovska, Mama Z's owner. Mr. Zaccaro claimed that he was owed a further \$9,600.

8. The delegate advised the Employer of Mr. Zaccaro's complaint but received no response. The Director also issued a demand for Employer Payroll Records. Those records were to be produced by December 30, 2011. No records were provided to the Director. The delegate sent a letter to the Employer advising that a preliminary assessment of Mr. Zaccaro's claim indicated that he was owed \$9,600 in wages. The Employer did not respond to this letter.
9. The delegate identified some concerns he had about Mr. Zaccaro's claim. He noted that although Mr. Zaccaro asserted that he was promised \$3,200 per month and even though he worked over four months and received \$1,800 cash, the total amount owing would be \$13,522.58, not the \$9,600 Mr. Zaccaro actually claimed. Noting, however, that the Employer had not challenged Mr. Zaccaro's claim in any way, the delegate concluded that Mr. Zaccaro was entitled to wages in the amount claimed, plus vacation pay on those wages in the amount of \$384, for a total of \$9,984.
10. Mama Z's contends that the delegate failed to comply with principles of administrative justice by both failing to contact the Employer and failing to take reasonable steps to contact the Employer. As a result, Counsel submits, the Employer had no opportunity to make any submissions or provide any evidence in response to Mr. Zaccaro's complaint.
11. Counsel submits that the Director's correspondence was never received by the Employer and the Director was wrong in concluding that the Employer had an opportunity to respond.
12. The Employer argues that the Director failed to comply with his statutory duty under section 77 of the *Act* to make reasonable efforts to give an employer under investigation the chance to respond, resulting in prejudice to the Employer. Further, Counsel submits, the Director was aware from the other complaints that Mama Z's is a seasonal (summer only) restaurant in a remote area in northern British Columbia and that it was not reasonable to expect the Employer to receive correspondence during the winter months. Counsel also submits that the Employer provided records and corresponded regularly with the Director in relation to the other four complaints and the Director ought to have made follow up attempts to contact the Employer if he did not receive a response to this complaint.
13. Counsel further contends that it was the Director's practice to send correspondence by registered mail and that no registered mail tracking information was provided by the Director in relation to this complaint.
14. Finally, counsel also submits that the Director had possession of the Employer's fax, phone and email contact information but did not make reasonable efforts to contact the Employer using those methods.
15. Counsel submits that, had the Employer had the opportunity to provide employer records, it would have advised the Director that Mr. Zaccaro's claim was impossible because the Employer's business operates in the summer only, and Mr. Zaccaro could not have worked from January through May. Counsel says that Mr. Zaccaro was not employed as an executive chef, and although the restaurant opened in May 2011, Mr. Zaccaro assisted with some odd jobs for which he was paid.

ANALYSIS

16. Section 114 of the *Act* 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 the 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, 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 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.
17. Having reviewed the Section 112 record and Mama Z's submissions, I find no reasonable prospect that the appeal will succeed.
18. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was made.
19. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.

Natural Justice

20. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
21. The record discloses that on December 8, 2011, the Director emailed Ms. Ivanovska, a Director of 0777746 BC Ltd., notifying her of Mr. Zaccaro's complaint. The same day, a Demand for Employer Records was also sent by registered mail to the Employer's Dease Lake address. Canada Post tracking results confirm that the package was signed for on January 23, 2012. The signatory name is "Mama Z Jade Boulder Cafe".
22. On May 29, 2012, the Director sent a preliminary assessment letter to the Employer, with a copy by email.
23. I am satisfied, based on the Record, that the Director complied with the principles of natural justice by providing the Employer with an outline of the complaint and by seeking the Employer's response. The complaint information was provided to the Employer both by registered mail and by email. Although counsel for the Employer contends that the Employer operated the restaurant seasonally, the Canada Post tracking information confirms that the package was signed for at the end of January. If the signatory was not Ms. Ivanovska, it was an individual who had ostensible authority to act on the Employer's behalf. Furthermore, the Director provided the Employer with his assessment of the complaint by both mail and email at the end of May when the restaurant was allegedly back in operation for the summer months.
24. I am not persuaded that the Employer did not either have knowledge of the complaint or the opportunity to respond to it.
25. I am also not persuaded that the delegate failed to comply with section 77 of the *Act*, which requires the director to "make reasonable efforts to give a person under investigation an opportunity to respond" (my

emphasis). As the Tribunal has said on many occasions, the section 77 statutory obligation is a manifestation of one of the statutory objectives of the *Act* as set out in Section 2: *to provide fair and efficient procedures for resolving disputes over the application and operation of this Act.* (see *Insulpro* (BC EST #D405/98)). I find that the delegate met the statutory requirement of making reasonable efforts to give Mama Z's the opportunity to respond. I note, in particular, that the delegate acknowledged that the investigation extended over "an abnormally long period" because the Employer was out of contact for long periods of time. There is simply no evidence to support Mama Z's assertions that the Director failed to comply with the principles of natural justice.

26. I am not persuaded that there is a reasonable prospect the appeal will succeed on this first ground of appeal.

New Evidence

27. Counsel submits that, because the delegate failed to comply with the principles of natural justice, he failed to consider relevant evidence that was available but was not provided because of the delegate's failure to make reasonable efforts to allow the Employer an opportunity to respond. I have found no basis for this argument. Consequently, any "new evidence", is not new, having been available at the time of the investigation.
28. The Tribunal has long said that it will not consider evidence on appeal that was available at the time of the investigation but not provided to the delegate during that investigation. (see *Tri-West Tractor Ltd.*, BC EST # D268/96)
29. I am not persuaded that there is a reasonable prospect the appeal will succeed on this second ground of appeal.

ORDER

30. Pursuant to Section 114 (1)(f) of the *Act*, I dismiss the appeal on the grounds that there is no reasonable prospect that it will succeed. Accordingly, the October 1, 2012, Determination as it relates to Mr. Zaccaro, is confirmed in the amount of \$10,386.91 together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal