



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/130

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 Dennis Deans ("Mr. Deans") whom the Director found was entitled to wages and interest in the amount of \$4,385.57.
2. In that Determination, the Director found that Mama Z's had contravened sections 17 and 18 of the *Act* in failing to pay wall 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 both erred in law and failed to comply with the principles of administrative justice.
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, or if I decline to extend the time for filing an appeal, 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. Mr. Deans' complaint was filed December 1, 2010. Each of the employees worked in different capacities and for different terms spanning a two year period from May 2009 until May 2011. 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".
7. Mr. Deans advised the delegate that he was employed as a chef at Mama Z's from July 1, 2009, until October 15, 2010, and that he had not been paid for four pay periods between May 14 and July 15, 2010. He said that although the Employer agreed to pay him eventually, that did not occur.
8. The Employer contended that Mr. Deans had been paid for all pay periods and submitted copies of pay stubs and cheques for each pay period. A May 9, 2010, cheque in the amount of \$900.00 had written across its face

the word “VOID” along with the notation “pd cash”. The initials “DD” were also written on the front of the cheque. The Employer provided similar cheques for the May 31, 2010, and June 14, 2010, pay periods. The Employer submitted no evidence that Mr. Deans had been paid for the June 30, 2010, pay period. The pay statement for the July 15, 2010, pay period was accompanied by a cheque dated July 8, 2010, that was both unsigned and had a line drawn across it along with the words “receive cash” and “go to Dawson” written on it.

9. The Employer acknowledged that none of the cheques had been cashed but contended that Mr. Deans received the full amount of each cheque in cash.
10. The delegate found a number of inconsistencies in the Employer records. He noted that the dates of the cheques did not match the pay periods, the amounts of the cheques differed from the net amounts on the pay statements and the cheques appeared to be written out of order (cheque 0909 was dated May 31, 2010, while 0907 was dated June 14, 2010). The delegate determined that the Employer’s records could not be relied upon due to the inconsistencies and deficiencies, and concluded that the Employer had not demonstrated that Mr. Deans received any of the funds.
11. However, the delegate determined that the Employer’s pay statements were the most accurate record of gross wages earned. Using those pay statements, the delegate determined that Mr. Deans was entitled to wages in the amount noted above.
12. Mama Z’s has appealed the Determination relating to all five employees. The deadline for filing the appeal was 4:30 p.m., November 8, 2012. An appeal for one employee named in the Determination was filed on November 8, 2012. At the time of filing that appeal, counsel for Mama Z’s indicated that an appeal for each of the remaining four employees named in the Determination would be filed, but that the appeals would be filed late.
13. Counsel noted that November 8, 2012, was a Thursday before a long weekend and as such, the appeal was filed on the third business day after the statutory deadline. Counsel said that he had intended to make an application to extend the appeal deadline and relied on the Tribunal’s advice that it was not possible to do so. He says that he was advised that the only option available to him was to file the appeal late and justify the late filing at that time.
14. Counsel says that the Employer, who operates a seasonal business in a remote part of British Columbia, was in the process of shutting down the year’s operations and did not receive the Determination until October 15, 2012. Counsel says that there was no one able to represent the Employer in the Dease Lake region and that after attempting to retain other counsel, he was able to meet with the Employer on November 5, 2012. Counsel submits that the appeal was filed late by only a few days and that there is no evidence of prejudice to any party.
15. Counsel indicated that the reason for the late filing was that he had only recently been retained and that he had insufficient time in which to file separate appeals for each individual employee, and that the appeal as it related to Mr. Deans was too complex to file within the appeal deadline.
16. Mama Z’s contends that the delegate failed to observe the principles of natural justice by failing to refer this matter to an oral hearing in order to resolve the conflicting evidence of the parties.

17. The Employer also argues that the delegate erred in law by rejecting the Employer's records in the face of contradictory evidence from all parties and failing to resolve the conflicts in the evidence by holding an oral hearing.
18. Counsel for the Employer argues that the delegate erred in failing to rely in any way on the Employer's records, relying instead on Mr. Deans' records. While counsel acknowledges that the Employer's records were poorly kept and organized, the delegate's decision to rely solely on the Employee's records was both unreasonable and an error of law. Counsel argues that the Director ought to have held an oral hearing in order to resolve the conflicting evidence.
19. Counsel also argues that the Director had a duty to scrutinize all of the documents and not reject documents without clearly articulating a reason for doing so.
20. Counsel further argues that it also appears that the Director failed to test the Employee's evidence in any significant way or at all, and given the contradictory records, ought to have made further inquiries, such as demanding bank records that might have been relevant to show cash deposits. Counsel submits that the Director's failure to do so constitutes a failure to comply with the principles of natural justice.

ANALYSIS

21. 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.
22. Having reviewed the Section 112 record and Mama Z's submissions, I find no reasonable prospect that the appeal will succeed.
23. 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.
24. 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.

Timeliness

25. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.
26. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
27. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
28. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
 - (3) the respondent party as well as the director has been made aware of this intention;
 - (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - (5) there is a strong *prima facie* case in favour of the appellant.
29. The Determination included five distinct employee determinations. The first appeal was filed within the statutory deadline and at that time, the Tribunal was made aware of the Employer's intention to appeal all five of the individual determinations. The Employer further indicated that the balance of the appeals would be filed late.
30. I find that there was a reasonable and credible explanation for the failure to request an appeal within the statutory time limit and that, in the end, the appeals were submitted shortly after the statutory deadline. I do not find that there was any prejudice to the other parties.

Natural Justice

31. Until 2002, the Employment Standards Branch investigated all complaints. On May 30, 2002, an Act amending the *Employment Standards Act* (the *Employment Standards Amendment Act*, S.B.C. 2002, c. 42) received Royal Assent and several of its provisions were brought into effect. Specifically, Part 10 of the *Act* allowed the Director to engage in alternate processes, including investigation and oral hearing, in reviewing, making findings of fact and determining a complaint. Since that date, the Branch investigates some complaints and adjudicates others.
32. It continues to do so in some cases. The Director interprets the *Act* as allowing a choice between an adjudication process and an investigation process. There is nothing requiring the Director to hold one form of hearing rather than another.

33. As the Tribunal stated in *J.C. Creations* (BC EST # RD317/03):

Section 77 of the Act requires that the Director “...make reasonable efforts to give a person under investigation an opportunity to respond”. Section 77 is thus a legislated, minimum procedural fairness requirement. It is consistent with the purposes of the *Act* “to promote the fair treatment of employees and employers” and “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act” (Sections 2(b) and (d) of the *Act*). The issue here is whether the Director’s Delegate made “reasonable efforts” to give the Employer an opportunity to respond to the investigation being conducted by the Delegate.

The requirement under Section 77 of the *Act* in no way requires that an oral hearing be held. That is recognized by the Tribunal in the already cited *BWT Business World* decision. It is also reflected in the following comments by the Tribunal in *Milan Holdings Ltd.*, *supra*, at para. 30:

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”.

34. I am not persuaded that the Director’s decision to investigate the complaints rather than hold an oral hearing constitutes a failure to comply with natural justice. While there is no doubt that the evidence from both parties was wanting in terms of credibility, I am unable to conclude that the Director was under any duty to conduct an oral hearing in order to resolve any evidentiary conflicts or that her decision not to do so constitutes a denial of natural justice.

35. I am also not persuaded that the Director failed to scrutinize the evidence or failed to give reasons for rejecting the Employer’s evidence. Sections 27 and 28 of the *Act* require an Employer to maintain employment records, including hours of work and wage statements. Following a Demand by the Director, the Employer submitted both pay statements for Mr. Deans as well as a number of paycheques that she acknowledged had never been cashed. She contended that Mr. Deans had been paid in cash, a contention the delegate rejected. The delegate articulated his reasons for not accepting the Employer’s assertion, which were that the cheque amounts did not correspond with the net amounts on the pay statements and the cheques appeared to have been written out of order. Further, the Employer provided no evidence of the cash payments, either by bank statements or receipts.

36. Finally, I do not accept Counsel’s submission that the Director rejected all of the Employer’s evidence. The Determination itself indicates that the Director relied on the Employer’s pay statements as “the most accurate record or (sic) gross wages earned”. The Determination shows that the delegate found that the Employer’s records were the best evidence of Mr. Deans’ hours of work but rejected the Employer’s assertions that Mr. Deans was paid for that work. The burden of demonstrating that an Employee has been paid for work performed rests with the Employer. I find no basis to interfere with the Director’s conclusion that the Employer failed to discharge this burden.

37. I am not persuaded that there is a reasonable prospect the appeal will succeed on either ground of appeal.

ORDER

38. 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. Deans is confirmed in the amount of \$4,385.57 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