



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/131

**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 Mariana C. Rosales ("Ms. Rosales"), whom the Director found was entitled to wages and interest in the amount of \$5,453.44.
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. 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. Ms. Rosales informed the delegate that she was employed as a server at Mama Z's from October 11, 2009, until April 14, 2010, and that she had not been paid all wages owing for the last six months of her employment. She alleged that she was paid \$1,434 cash on account of wages and a further \$735.61 during the investigation. She alleged that she was still owed regular and overtime wages as well as vacation and statutory holiday pay. Ms. Rosales further alleged that she was entitled to an hourly wage of \$9.18 but the Employer's wage statement indicated her hourly rate was \$9.15.

8. The Employer provided the delegate with a number of documents, including a Labour Market Opinion, schedules, pay statements, witness statements and Western Union receipts in support of her contention that Ms. Rosales had been paid all wages owing. However, the Employer also took the position that the timesheets/work schedules were inaccurate and overstated Ms. Rosales' hours of work by 238.5 hours. In support of that contention, the Employer provided copies of calendar pages which contained recorded hours of work that were completely different than those on the time sheets. Ms. Ivanovska, the owner of Mama Z's, advised the delegate that she paid Ms. Rosales whatever Ms. Rosales had written on the timesheet even though the Employer knew the hours were incorrect. The Employer produced new time sheets reflecting her view of Ms. Rosales' hours of work. The Employer advised the delegate that she did not want any trouble as she found it difficult to find employees in Dease Lake.
9. The delegate reviewed the conflicting documents and noted that even though the Employer disputed Ms. Rosales' time sheets, she acknowledged that she nevertheless paid Ms. Rosales based on those documents. The delegate found that the time sheets submitted for Ms. Rosales were different in format from those submitted for her co-workers. He noted that although Ms. Rosales' signature was at the bottom of each page, the signature appeared identical from month to month: *It is difficult to be certain based on photocopies of the records, but it does appear that the same signature has been copied and applied to each month's records.* The delegate stated that a review of the pay statements "raises more questions than it answers". He noted that, in each case, the Employer asserted that they prepared a payroll and a cheque for Ms. Rosales, but the cheque was never issued to her. Rather, the Employer asserted, Ms. Rosales was given cash in the amount of the cheque, and Ms. Rosales would sign, acknowledging receipt of the cash. The delegate noted that the handwriting on each of the "receipts", including Ms. Rosales' signature, was identical in each case.
10. The delegate found that Ms. Rosales' hourly wage was \$9.18 per hour rather than the \$9.15 the Employer paid her based on the Labour Market Opinion. He placed no weight on the Employer's records of Ms. Rosales' hours worked and wages paid because of the "inconsistencies, contradictions and uncertainties" in the records and found Ms. Rosales' records of hours worked to be the best evidence.
11. 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 indicted 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.
12. Counsel noted that November 8, 2012, was a Thursday before a long weekend and as such, this 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.
13. 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.

14. 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 Ms. Rosales was too complex to file within the appeal deadline.
15. 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. Counsel says that although the delegate found some of the employee's records to be less than reliable and noted that original documents were not provided in some cases, nevertheless relied on paystubs for some employees but not for others to arrive at his conclusions.
16. 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.
17. Counsel for the Employer acknowledges that the Employer's records were poorly kept and organized. However, he submits that it was both wholly unreasonable and an error of law for the delegate to choose to rely on Ms. Rosales' evidence to the exclusion of contrary evidence of the Employer. Counsel argues that the Director ought to have held an oral hearing in order to resolve the conflicting evidence. Counsel further notes that Ms. Rosales had "full access" to the Employer's payroll documents and that when Ms. Rosales left her employment, the Employer discovered that Ms. Rosales' payroll records were missing. Counsel says that although the delegate was aware of this issue, he chose not to follow up on it by putting this allegation to Ms. Rosales.
18. 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.
19. 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

20. 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.

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

24. 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.
25. 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*.
26. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
27. 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.
28. 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.
29. 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

30. 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.
31. 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.
32. As the Tribunal stated in *J.C. Creations* (BC EST #RD 317/03):

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 give a person under investigation an opportunity to respond".

33. 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.
34. I am also not persuaded that the Director failed to scrutinize the evidence or give reasons for rejecting the Employer's evidence.
35. Sections 27 and 28 of the *Act* require an Employer to maintain employment records, including hours of work and wage statements. Although those records were provided by the Employer, they were not only in disarray, as the Employer conceded, they were also wrong. The "correct" records were found to be unreliable by the delegate, for reasons specified in the Determination: they appeared fraudulent. Ms. Rosales' records were neither duplicated, nor, I infer, duplicitous. Given that it is the Employer's burden to both maintain records

and to demonstrate that an employee has been paid, I find no basis for counsel's argument that the delegate was under a duty to convene an oral hearing. The delegate scrutinized the records of the Employer and Ms. Rosales, and rejected the records of the Employer for reasons he articulated in the Determination.

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

**ORDER**

37. 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 Ms. Rosales is confirmed in the amount of \$5,453.44 together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**