

An appeal

- by -

0817924 B.C. Ltd. carrying on business as Pappas Roasters Rutland
("Pappas Rutland")

– 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)

and

An application for suspension

- by -

0817924 B.C. Ltd. carrying on business as Pappas Roasters Rutland
("Pappas Rutland")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

Pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2010A/161 & 2010A/162

DATE OF DECISION: January 20, 2011

DECISION

SUBMISSIONS

Nolan Belanger on behalf of 0817924 B.C. Ltd.
Jennifer R. Redekop 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 0817924 B.C. Ltd. carrying on business as Pappas Roasters Rutland (“Pappas Rutland”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 30, 2010.
2. The Determination was made in respect of a complaints filed by Jay-Lin Melnichuk (“Ms. Melnichuk”) and Aria Rosvold (“Ms. Rosvold”), who alleged they were owed wages. During the course of the investigation, the Director found there was another employee, Nathan Wille (“Mr. Wille”), who had not been paid all wages owed and conducted an investigation on behalf of that employee as well.
3. The Determination found that Pappas Rutland was an employer responsible for the wages claimed by the three individuals and had contravened Part 3, sections 17 and 18 and Part 4, section 40 of the *Act*. The Director ordered Pappas Rutland to pay Ms. Melnichuk, Ms. Rosvold, and Mr. Wille an amount which totalled \$1,999.48, inclusive of wages and interest.
4. The Director also imposed administrative penalties on Pappas Rutland 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 \$3,499.48.
6. In this appeal, Pappas Rutland says the Director erred in law and failed to observe principles of natural justice in making the Determination and seeks to have the Determination cancelled.
7. Pappas Rutland also seeks a suspension of the effect of the Determination under section 113 of the *Act* pending the outcome of this appeal.
8. 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

9. The issues in this case are whether Pappas Rutland can demonstrate the Director either erred in law or failed to observe principles of natural justice in making the Determination.

THE FACTS

10. Pappas Rutland operated a Pappas Roasters restaurant located in Rutland. In May 2010, the principal of Pappas Rutland, Nolan Belanger (“Mr. Belanger”), took over the operation of another Pappas Roasters

restaurant located in Lake Country. Until May 2010, that location had been operated by Sockeye Sam's Restaurants Inc. ("Sockeye Sam's"), a company that was unrelated to Pappas Rutland.

11. Ms. Rosvold and Mr. Wille worked at Pappas Roasters' Lake Country restaurant before and after its operation was taken over by Mr. Belanger. Their employment ended May 26, 2010, when that restaurant was closed. There is no issue that until Mr. Belanger took over the operation of the Lake Country location of Pappas Roasters, which the Director found to be on or about May 3, 2010, Ms. Rosvold and Mr. Wille were employed by Sockeye Sam's, whose principal is Fotis Sotiros, and that Mr. Sotiros had issued a cheque to each of Ms. Rosvold and Mr. Wille for wages for work performed for Sockeye Sam's in the last half of April 2010 that were returned NSF. The claims made by Ms. Rosvold and Mr. Wille were for the amounts of their respective cheques.
12. Ms. Melnichuk worked at Pappas Roasters' Rutland and Lake Country locations. Her employment ended June 20, 2010. She claimed unpaid regular wages, overtime wages and annual vacation pay covering a period from April 26, to May 30, 2010.
13. The Director considered whether Pappas Rutland was liable for the unpaid wages of Ms. Rosvold and Mr. Wille. In this respect, the Director made two key findings.
14. First, the Director found that section 97 of the *Act* applied to the take-over of the Pappas Roasters' Lake Country restaurant by Pappas Rutland effective May 3, 2010, making Pappas Rutland the employer of the employees of that business on that date and making the employment of Ms. Rosvold and Mr. Wille continuous and uninterrupted through the full period of their employment with both Sockeye Sam's and Pappas Rutland. Second, the NSF wage cheques to Ms. Rosvold and Mr. Wille became payable after the date of the disposition of the Pappas Roasters' Lake Country location to Pappas Rutland.
15. As a result of the above findings, the Director concluded Pappas Rutland was liable for the unpaid wages of Ms. Rosvold and Mr. Wille, represented by the amounts of the NSF cheques, and for the wages of Ms. Melnichuk when she worked at the Lake Country location of Pappas Roasters.

ARGUMENT

16. Mr. Belanger, on behalf of Pappas Rutland, disagrees with the finding of the Director under section 97 of the *Act*, specifically that aspect of the section 97 finding which made Pappas Rutland responsible for the wages of the three individuals while they worked at the Pappas Roasters' Lake Country location. Pappas Rutland challenges some of the factual findings made by the Director, arguing there was no "legal proof" for those findings.
17. In response to the appeal and the arguments made on behalf of Pappas Rutland, the Director says there was evidence presented by the parties and witnesses, an analysis of that evidence was given in the Determination, including reasons why some evidence was preferred over other evidence, and conclusions were reached on that evidence. The Director says there is no error in law in respect of the findings of fact.
18. The Director says no argument has been provided by Pappas Rutland challenging the legal analysis on the section 97 question and no argument or evidence relating to the alleged failure by the Director to observe principles of natural justice in making the Determination. The Director refers to the section 112(5) Record and asserts that Pappas Rutland was made aware of the nature of the complaints, given an opportunity to respond to the complaints, alerted to the potential application of section 97 to the circumstances, provided with preliminary findings on the claims and the section 97 issue and provided with an opportunity to respond

to the preliminary findings. Finally, the Director denies any factual findings were based on “personal preference”, but were decided on the facts. In sum, the Director contends there was no error of law on the section 97 analysis or breach of natural justice principles in making the Determination

ANALYSIS

19. 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.*

20. 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.

21. 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.

22. 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.

23. I will first address the natural justice arguments made by Pappas Rutland. As indicated above, a party asserting a failure to observe principles of natural justice bears the burden of establishing such a breach. 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 *BWI Business World Incorporated*, BC EST # D050/96.

24. While Pappas Rutland has alleged a failure by the Director to observe principles of natural justice in making the Determination, the appeal does not connect that allegation to any aspect of the complaint process. Rather, Pappas Rutland seems to presume that a natural justice argument lies because, in Mr. Belanger's view, there are "many inaccurate statements" in the Determination and the Director accepted certain evidence in dealing with the section 97 question, did not accept his assertions on that matter and made findings of fact against his position. As I stated in *Dongoh Educational Company Ltd.*, BC EST # D049/09, at para. 32, in a comparable appeal argument:

The Tribunal recognizes persons without legal training do not always appreciate what "natural justice" means, and the concept can be confusing and complex to a lay person. Generally, the notion of "natural justice" requires a decision maker to provide all of the parties with a fair opportunity to be heard and to not interfere with that opportunity in an unfair or inappropriate way. Natural justice does not require the decision maker to accept everything each party says – that would be absurd and make the process unworkable – nor does it prohibit the decision maker from accepting the position of one party and rejecting the position of the other so long as reasons are provided for the choice made and those reasons are based on relevant considerations, which I find they were in this case. In deciding the merits of the complaint, the Director had to make some choices between the competing positions of the parties. The reasons for those choices are explained in the Determination. Dongoh may not like the choices made, but they were provided with an opportunity to present their position in evidence and argument and, in the circumstances, I am unable to accept there was any failure by the Director to observe principles of natural justice in making the choices and the resulting Determination.

25. The above describes exactly the circumstances of the Determination under appeal. The Director was required to make choices in respect of the position of the parties. Choices were made by the Director; reasons for the choices made were provided in the Determination and appear to be based on relevant considerations. Making those choices does not amount to failure to observe principles of natural justice. In every respect Pappas Rutland was provided with the opportunity required by section 77 of the *Act* and principles of natural justice to present his position and to respond to the position presented by other parties and witnesses.
26. This ground of appeal is dismissed.
27. In respect of the error of law ground of appeal, Pappas Rutland has not shown any error of law was made by the Director in making the Determination. The definition of error of law accepted by the Tribunal is set out above. The Director's application of the principles that apply to section 97 and the obligation of Pappas Rutland for the wages of the claimants were consistent with both the relevant legislative provisions and the accepted application and operation of those principles to the facts as found by the Director. There was nothing new or unique in the conclusions made by the Director in this case. Nor is there any basis for asserting the Director acted without any evidence or acted on a view of the facts that could not reasonably be entertained. The Director had evidence from a number of sources, including Mr. Belanger, on the section 97 issue. On an objective assessment of that evidence, the conclusion reached by the Director on that issue was not unreasonable or unjustified. The suggestion by Mr. Belanger that the Director based findings on "personal preference" is without foundation and I reject it totally. I accept that the facts as presented to the Director did show that Pappas Rutland, through Mr. Belanger, had assumed a degree of control over the business of the Pappas Roasters Lake Country location demonstrative of a transfer of that business from Sockeye Sam's to Pappas Rutland.

28. This ground of appeal is also dismissed. As there are no other grounds of appeal to address, the appeal is dismissed.
29. Based on this decision, it is unnecessary to consider the request to suspend the effect of the Determination. On the facts here, it would not, in any event, have been granted.

ORDER

30. Pursuant to section 115 of the *Act*, I order the Determination dated September 30, 2010, be confirmed in the amount of \$3,499.48, together with any interest that has accrued under Section 88 of the *Act*

David B. Stevenson
Member
Employment Standards Tribunal