

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/133

**DATE OF DECISION:** January 23, 2013

## DECISION

### SUBMISSIONS

Fred Wynne, Hamilton Howell Bain & Gould      counsel for 077746 B.C. Ltd. carrying on business as Mama Z's Jade Boulder Cafe

### OVERVIEW

1. This is an appeal by 077746 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 Andrew Creyke ("Mr. Creyke"), whom the Director found was entitled to wages and interest in the amount of \$4,168.84.
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. Mr. Creyke informed the delegate that he was employed as a kitchen helper at Mama Z's from September 1, 2009, until December 17, 2009, and that the Employer had failed to regularly pay wages. He alleged that the Employer would promise to "catch up" when things got busy, but that this never occurred. Mr. Creyke told the delegate that he only received two pay cheques over the course of his employment, and submitted those to the delegate. Those two pay stubs indicated that Mr. Creyke has been paid a total of \$864.53 for two pay periods: October 2, 2009, and October 16, 2009.

8. Mr. Creyke also provided copies of his calendar pages on which he set out his hours of work over his entire period of employment.
9. The Employer contended that Mr. Creyke had been paid for all hours of work and submitted copies of 3 pay stubs which the Employer contended showed all wages paid.
10. The delegate noted that Mr. Creyke's records did not appear to have been made contemporaneously and "may have been set out on the calendar for the purposes of supporting his claim". Reviewing the Employer's records, the delegate noted that two of the pay stubs submitted were identical to those submitted by Mr. Creyke. He further noted that the third pay stub submitted by the Employer was also for the October 16, 2009, pay period and contained the notation *I received full Amount in cash* (sic) "along with a scrawl which may or may not be Mr. Creyke's signature". The Employer also submitted a further pay statement dated October 30, 2009, for 40 hours of work also containing the same notation *I received full amount in cash* (sic) along with what the delegate determined to be "a slightly different scrawl". Finally, the Employer submitted a document bearing Mama Z's logo dated November 27, 2009, with the notation *I received full amount 47 hours in cash* (sic) with "a scrawl" below the notation. The delegate observed that the numbers "47" "appeared to have been added after the fact". The delegate reviewed the Employer's records for periods in September, October, and November, noting that the November schedule was dated November 31, 2009, a date which does not exist.
11. The delegate reviewed the conflicting documents and noted that the Employer's documents, as a whole, were "rife with inconsistencies, contradictions and deficiencies". He noted that the Employer had submitted two different versions of Mr. Creyke's October 1 - 15, 2009, work schedule. The delegate considered a time sheet submitted by the Employer for what purported to be Mr. Creyke's hours of work between October 17 - 31, 2009. The delegate reviewed time sheets submitted by the Employer for other employees that showed Mr. Creyke's hours of work between October 26, 2009, and November 6, 2009, and noted that those hours were either completely different or not recorded at all. The delegate further noted that the Employer "had not addressed in any way Mr. Creyke's claim that he commenced work at the beginning of September 2009 and worked until mid-December 2009." For these reasons, the delegate found that the Employer's records could not be relied on, and that Mr. Creyke's records "notwithstanding my concerns about them" constituted the "most reliable evidence with respect to hours of work and wages received."
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, 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.
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. Creyke 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 evidence by holding an oral hearing.
18. 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 Mr. Creyke's records when he clearly noted problems with those records. Counsel further argues that the Director erred in law, or failed to observe the principles of natural justice in accepting Mr. Creyke's evidence and completely disregarding the Employer's records, notwithstanding obvious stated concerns with the accuracy of the evidence of both parties. 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. Counsel argues that the Director's failure to give sufficient or any reasons for his outright rejection of the Employer's evidence was an error of law, and that the correct approach was to hold an oral hearing.
20. Counsel argues that the delegate failed to address whether or not the "scrawl" on the Employer's documents was Mr. Creyke's signature. Counsel notes that this issue, raised by the delegate himself and which was directly relevant to the adjudication of the complaint, constitutes a failure to observe the principles of natural justice by denying both parties the opportunity to answer the Director's concerns.

## 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 four late 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 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 less than reliable, 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 give reasons for rejecting the Employer’s evidence.
36. 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 in disarray, as the Employer conceded. The Employer submitted records that were duplicates, contained erroneous and non-existent dates and conflicted with other records. The delegate rejected the Employer’s documents because they were “rife with inconsistencies, contradictions and deficiencies” and set out examples of those problems. I find no error of law in his reasoning. Faced with documents from both parties that were less than satisfactory, the delegate nevertheless had to decide whether or not the Employer had paid Mr. Creyke his full wages. Although the delegate was concerned as to whether or not Mr. Creyke’s records were made contemporaneously, he nevertheless found Mr. Creyke’s evidence more reliable. While I agree it might have been helpful, for example, if the delegate had provided more robust reasons for preferring Mr. Creyke’s records, I am not able to find the delegate erred by not resolving any concerns he had by way of an oral

hearing. Furthermore, while I also agree it would have been prudent for the delegate to have asked Mr. Creyke whether or not the “scrawl” on the Employer’s documents was his, given the general unreliability of the Employer’s documents for all employees, I am not persuaded that he erred in rejecting the Employer’s documents entirely.

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. Creyke is confirmed in the amount of \$4,168.84 together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.
39. As this is the final decision on all five of the Employer’s appeals, I also confirm the two administrative penalties imposed on Mama Z’s for contraventions of the *Act*. As a consequence, I confirm the Determination in the total amount of \$30,271.44 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**