

An appeal

- by -

Candiz Bakery & Café Trading and Services Inc.  
("Candiz")

- 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

**TRIBUNAL MEMBER:** Matthew Westphal

**FILE No.:** 2004A/185

**DATE OF DECISION:** January 13, 2005

## DECISION

### OVERVIEW

This is an appeal by Candiz Bakery & Café Trading and Services Inc. (“Candiz”) under section 112 of the *Employment Standards Act* (the “*Act*”) of Determination ER # 118-917 dated September 20, 2004 (the “Determination”), issued by a delegate (the “Delegate”) of the Director of Employment Standards. The Delegate ordered that Candiz pay wages owed to Payman Shafiee (“Shafiee”), and imposed an administrative penalty of \$500 for a contravention of the *Act*.

The Tribunal has decided that this case can be decided without an oral hearing. Based on my review of the Determination, the submissions of the parties, and the record provided to me, I am dismissing this appeal.

### ISSUE

Should the Determination be set aside on the basis that the Delegate failed to observe the principles of natural justice, or on the basis of new evidence that was not available at the time the Determination was being made?

### BACKGROUND

Candiz operates a bakery and café in North Vancouver. Its principal is Masoud Mobasser Ganjavi, MD (“Ganjavi”).

In 2003 Candiz planned to expand its business by opening a delicatessen next door. There were discussions between Ganjavi and Mohammed Javad Khazaneh (“Khazaneh”), Shafiee’s father, about the possibility of forming a partnership or company to operate such a business. Shafiee also began working at Candiz. Ultimately, the development of the delicatessen business proceeded without any involvement on the part of Khazaneh.

Shafiee complained to the Director that he had worked for Candiz from May 20, 2003 until July 24, 2003, sometimes more than 8 hours per day or 40 hours per week, but had been paid nothing. Shafiee stated that he had both worked in the bakery and café, and performed renovations for the delicatessen.

Ganjavi denied that Shafiee had ever been an employee of Candiz, or had done the work that he had claimed. Rather, he took the position that Shafiee had simply observed and learned the operation of the business so that he would be able to protect his father’s investment in the business. At the same time, Ganjavi also denied that there had ever been a partnership between him and Khazaneh. He accused Khazaneh and Shafiee of having attempted to use him to perpetrate an immigration fraud.

After conducting a hearing, the Delegate accepted Shafiee’s evidence concerning his job duties and hours of work, and found that he had been an employee of Candiz. She also found that he was not a manager under the *Act*, and accordingly, was entitled to payment of regular wages, statutory holiday pay, vacation pay, and overtime pay for the work he had performed. However, the Delegate denied Shafiee’s claim for reimbursement of expenses he says he incurred while working for Candiz.

## SUBMISSIONS

Ganjavi, on behalf of Candiz, sought to introduce new evidence that, he says, supports his contention that Shafiee was never an employee of Candiz, and also did not work as many hours as he has claimed. Ganjavi also argues that the Delegate failed to consider various aspects of the evidence at the hearing.

Shafiee reiterated his position that he worked for many hours as an employee of Candiz without being paid, and addressed the evidence that Ganjavi says the Delegate ignored. He likewise provided additional evidence to buttress his position.

A different delegate of the Director of Employment Standards provided the record that was before the Delegate when she issued the Determination, but he did not make a submission on this appeal.

## ANALYSIS

Candiz asserts two bases for its appeal: it says that there is new evidence that was not available at the time of the Determination, and claims that the Delegate failed to observe the principles of natural justice in issuing the Determination.

### ***1. Should the new evidence be admitted?***

Section 112(1)(c) permits a person to appeal a determination on the basis that new evidence has become available that was not available at the time of the determination. As discussed in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03, this provision is not intended to allow a person dissatisfied with a determination to seek out more evidence to supplement what was already provided to the Director. Accordingly, the Tribunal only admits fresh evidence when four criteria are met:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue

Ganjavi has not given any reason why the new evidence he has provided could not, with due diligence, have been discovered and presented to the Delegate at the hearing of Shafiee's complaint. Accordingly, I am not admitting it, and deny Candiz's appeal under s. 112(1)(c) of the *Act*. In any event, much of the new evidence sought to be introduced was irrelevant to the issues before me and not of high probative value.

**2. *Did the Delegate fail to observe the principles of natural justice?***

On the question of natural justice, most of the submissions of Candiz were an attempt to reiterate arguments that were made to the Delegate, and rejected. Natural justice encompasses procedural rights that ensure parties know the case against them, have an opportunity to respond, and are heard by an independent decision maker. Ultimately, the dispute before the Delegate was whether Shafiee had, as Ganjavi maintained, just observed in the bakery/café occasionally on behalf of his father, or whether he had, as he claimed, worked full-time both in the bakery/café and doing renovations in the space next door to prepare it for the delicatessen.

The issue amounted primarily to a contest of credibility. Ganjavi was aware of Shafiee's allegations that he had worked as an employee of Candiz, and the Delegate conducted an oral hearing at which Ganjavi was present, led evidence, and made submissions. The Delegate provided a thorough summary of the evidence before her, and gave the following reasons for why she considered Shafiee's evidence more credible:

I prefer the position of Shafiee to that of Ganjavi. I find Ganjavi's testimony was contradictory. He stands firm in his position that Khazaneh at no time was in a partnership with him; but on the other hand, takes the position that Shafiee's time spent "observing" the business was solely in support of Khazaneh's interest in their partnership. Shafiee gave evidence that the work he performed was for Candiz. The testimonies of his witnesses are consistent with his claim. Based on a balance of probabilities and on the evidence made available to me I find that Shafiee's employment was solely with Candiz.

The Delegate, who observed and heard the witnesses' testimony in person, was in the best position to assess credibility. For her to prefer the evidence of one party over another in these circumstances was not a denial of natural justice: *Masev Communications*, BC EST #D205/04.

In his appeal submission, Ganjavi also alleges that the Delegate failed to consider certain evidence from the hearing. As was discussed in *Britco Structures Ltd.*, BC EST #D260/03, and cases cited in that decision, a failure to consider a relevant portion or portions of the evidence can be a breach of the principles of natural justice.

However, I find that Ganjavi has not established that the Delegate failed to consider all the relevant evidence that was before her at the hearing. The Delegate had a duty to provide reasons for her decision, but she was not required in those reasons to deal specifically with every piece of evidence before her. That she did not mention every evidentiary detail relied upon by Ganjavi at the hearing does not necessarily mean that she did not consider them. In any event, I note that the Delegate, when setting out evidence that had been led by Shafiee, did advert to some of Ganjavi's evidence and submissions to the contrary, which he now contends that she did not consider.

Finally, the central basis for the Delegate's finding that Shafiee was an employee was that she found, based on her assessment of the evidence, that he fell within the definition of "employee" in s. 1 of the *Act* by reason of performing work that would normally be done by an employee. The evidence which Ganjavi argues the Delegate failed to consider was not material to this decision, as it involved character evidence and the question of whether Shafiee was originally introduced to Ganjavi to obtain a summer job, or as part of the prospective partnership between Ganjavi and Khazaneh. Even if I were satisfied that the Delegate failed to consider this evidence – and I am not – I would not allow the appeal on this basis because I am not persuaded that this evidence was material to the Determination.

For these reasons, I find that Ganjavi has not met his burden of proving that the Delegate failed to observe the principles of natural justice in the Determination, and I dismiss this ground of appeal.

## **ORDER**

I order, pursuant to section 115(1)(a) of the *Act*, that the Determination be confirmed.

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**Matthew Westphal**  
**Member**  
**Employment Standards Tribunal**