

An appeal

- by -

Bitu Basir
("Basir")

- 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: David B. Stevenson

FILE No.: 2008A/140

DATE OF DECISION: January 22, 2009

DECISION

SUBMISSIONS

Bitu Basir	on her own behalf
Rod Bianchini	on behalf of the Director
David H. Stoller	on behalf of Bazar Enterprises Ltd. carrying on business as Urban Bazar

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “Act”) by Bitu Basir (“Basir”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 21, 2008.
2. The Determination was made on a complaint filed by Basir against Bazar Enterprises Ltd. carrying on business as Urban Bazar (“Urban Bazar”). Basir alleged Urban Bazar had contravened the *Act* by failing to pay regular and overtime wages, statutory and annual vacation pay and length of service compensation. The Director found that Urban Bazar had contravened Part 3, sections 17 and 18, Part 4, section 40, Part 5, section 46, part 7, section 58 and Part 8, section 63 of the *Act* and ordered Urban Bazar to pay Basir an amount of \$11,569.78 an amount which included wages and interest.
3. The Director also imposed administrative penalties on Urban Bazar under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1500.00.
4. The total amount of the Determination is \$13,069.78.
5. The Determination was issued following a complaint hearing which was conducted over three days in July, September and October 2007.
6. In this appeal, Basir submits the Director failed to comply with principles of natural justice in making the Determination.
7. Basir has not requested an oral hearing on the appeal. The Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

8. The issue is whether Basir has shown any reviewable error in the decision.

THE FACTS

9. Urban Bazar operates a market store in West Vancouver. Basir alleged that she worked at Urban Bazaar for periods of time between September 2005 and March 2006 and complained to the Director that she had not been paid any wages for her work.
10. Basir alleged she had been hired by her husband, who was at the time one of the directors of Urban Bazar, at a wage rate of \$20.00 an hour to perform a variety of tasks relating to the startup of Urban Bazar, including painting walls and ceilings in the store space, setting up inventory, pricing and setting up the floral department, and relating to its operation, including working the till, filling in the cash reports, doing inventory control, taking care of the floral department and managing the deli section.
11. In response to the complaint, Urban Bazar took the position that she was not an employee under the *Act* but if she was, her alleged wage rate of \$20.00 an hour was never discussed with or agreed to by the directors of Urban Bazar as a group and her record of hours worked was unreliable and unsupported by the evidence.
12. The Director framed the issues in the Determination as being whether Basir was an employee of Urban Bazar as defined by the *Act* and, if so, what was her wage rate, what were her hours worked and was she owed wages as claimed.
13. The Director found that Basir was an employee of Urban Bazar for the purposes of the *Act*, that she had performed work for which she had not been paid and, consequently, that she was owed wages. The Director found that the evidence did not support Basir's claim of hours worked or her wage rate as being \$20.00 an hour. There is a fairly comprehensive analysis in the Determination of the issues relating to the hours worked and the rate of pay.
14. On the former issue, the Director reached conclusions on the hours worked that were different than what Basir claimed. The Director generally accepted Basir's evidence that she worked long hours during the setup period (September to December 2006), but was not persuaded that the total number of hours claimed by her was sufficiently reasonable to use as a basis for her claim. In respect of the claim of hours worked during the period January to March 2007, the Director was similarly not persuaded the hours Basir claimed she worked was a reasonable representation of the hours she actually worked. The reasons for the conclusions on the hours worked are set out in the Determination. As a result of those conclusions, the Director made a finding on the number of hours worked.
15. On the rate of pay issue, the Director concluded, on a balance of probabilities, that the evidence did not support a claim of a \$20.00 an hour wage rate. The Director based the conclusion on the absence of records and discrepancies and inconsistencies in the evidence of Basir and her husband on this issue. Having rejected the claim for a wage rate of \$20.00 an hour, the Determination sets out the following, at page R18:

. . . there is no evidence of any other pay rate and as such I find the minimum wage rate established in the Regulation will be the wage rate enforced in this case.
16. The Director found there was overtime hours worked and compensated Basir according to that finding on the wage rate established in the Determination.

17. The Director also found Basir was owed overtime wages and was entitled to length of service compensation. The Director used an analysis under section 66 of the *Act* to decide Basir had been terminated from her employment. Annual vacation and statutory holiday pay was found to be owed based on the requirements found in sections 46 and 58, respectively, of the *Act*. The Director imposed interest under section 88 of the *Act* and administrative penalties based on the findings that Urban Bazar had contravened sections 17, 18 and 28 of the *Act*. None of these elements of the Determination are part of this appeal but have been challenged in an appeal filed by Urban Bazar and have been addressed in the decision relating to that appeal.

ARGUMENT AND ANALYSIS

18. 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.*

19. 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.
20. 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.
21. While Basir has not indicated in her appeal that she relies on evidence that was not before the Director at the time the Determination was made, there are several occasions in the appeal where facts are asserted that are not found in the Determination or the section 112(5) Record. Included in this evidence are references to the wage rates of other employees at Urban Bazar, to a statement from one of the witnesses for Basir at the complaint hearing that appears to contradict what was provided by this person at the complaint hearing and recorded in the Determination as his evidence and to the POS system, which the Director used to assist in calculating Basir's hours worked.
22. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal has discretion to allow new or additional evidence. As well as considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies*

and others (Merilus Technologies Inc.), BC EST #D171/03 and *Senor Rana's Cantina Ltd.*, BC EST #D017/05.

23. I am not inclined to accept any of this “new” evidence, as of this “new” evidence was reasonably available at the time the Determination was being made. As well, in the case of the about face in the evidence provided by one of Basir’s witness, that “new” evidence is not supported by any statement from the witness directly and there is a serious question about its admissibility and, even if it were admissible, its general credibility. Finally, although Basir has brought this appeal on natural justice grounds, these new assertions of fact – they are not really evidence – do not advance this ground of appeal or even assist in showing some other reviewable error in the Determination. Rather, it is apparent this “new” evidence has been asserted to support her disagreement with findings and conclusions of fact made by the Director on the wage rate and hours worked issues.
24. As indicated above, the Tribunal has limited jurisdiction in respect of findings of fact made by the Director. Essentially, the Tribunal has no authority over findings of fact that are not shown to be errors of law. Errors of law can include findings of fact resulting in a breach of principles of natural justice. The Tribunal has also provided an extensive analysis of its appeal authority in the context of findings of mixed fact and law: see *Britco Structures Ltd.*, *supra*. An appellant challenging findings of fact has the burden of persuading the Tribunal the findings made by the Director are an error of law, in the sense they are inadequately supported, or are wholly unsupported, by the evidentiary record with the result that there is no rational basis for the finding and so it is perverse or inexplicable.
25. Basir has failed to meet that burden. The challenged findings and conclusions of fact are supported on the Record. The Director has provided reasons for the findings made, which are based on an assessment of the evidence given at the complaint hearing and the relative credibility of the witnesses presented.
26. On the wage rate issue, Basir may disagree with the result based on her perception of the wage rate applied to her employment relative to the wage rates for other employees of Urban Bazar, but that result was substantially dictated by her inability to present clear evidence on that issue and the contradictory, inconsistent and unreasonable testimony provided in support of her claim for a wage rate of \$20.00 an hour.
27. Similarly, the hours of work issue was decided on the available evidence, including the inherent unreliability and unreasonableness of Basir’s record of hours worked. A significant part of Basir’s argument on this aspect of the appeal depends on a combination of having the Tribunal ignore the Director’s findings with respect to the credibility of her husband’s evidence and engage in a re-weighing of the evidence, reaching different conclusions. In the absence of Basir demonstrating some error of law in that regard, I am without authority to engage in such an analysis, even if I could find some other reason for doing so.
28. In the final analysis, the conclusions reached by the Director on the rate of pay and hours worked issues are not unreasonable or absurd when examined against the available evidence, the findings of fact made on that evidence and the reasons provided for those conclusions. They do not appear to manifestly unfair from an objective standard. The words of the Tribunal in *Mykonos Taverna operating as Achillion Restaurant*, BC EST#D576/98, at page 6 are appropriate to this appeal:

After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by

reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving “efficient” resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Docker’s Pub and Grill*, BC EST #D511/98). In this case the question is whether the appellant has shown the decision is unfair or unreasonable.

29. In respect of the chosen ground of appeal: the failure to comply with principles of natural justice in making the Determination, the Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST #D014/05:

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.

30. The Tribunal has also stated that 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.

31. As I alluded to above, Basir has not addressed her disagreement with the Determination in the framework of natural justice, but as a disagreement with findings and conclusions of fact. No evidence to support an allegation of non-compliance with natural justice principles has been provided and, in fact, the Record shows Basir was not denied the procedural rights identified in the above excerpt.

32. In the absence of such evidence this ground of appeal is dismissed.

33. Basir has also raised a question about correctness of the interest portion, asserting “the interest calculated on my claim does not reflect the time since the claim was made till the time the decision was made”, but has provided nothing on this point beyond that statement. Making that kind of statement does not satisfy the requirement for an appeal to the Tribunal under Section 112; no error is shown and I am unable to consider that question further.

34. In sum, the appeal is dismissed.

ORDER

35. Pursuant to Section 115, I order the Determination dated October 21, 2008 be confirmed in the amount of \$13,069.78, together with any interest that has accrued under Section 88 of the *Act*. Since the Director will be required to revisit the interest portion of the Determination in any event, it would be appreciated if some effort were made to provide Basir with the calculations of interest in order to assuage her concerns about the validity of the interest amount.

David B. Stevenson
Member
Employment Standards Tribunal