

An appeal

- by -

Bazar Enterprises Ltd. Carrying on Business as Urban Bazar
(“Urban Bazar”)

- 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/141

DATE OF DECISION: January 22, 2009

DECISION

SUBMISSIONS

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

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Bazar Enterprises Ltd. carrying on business as Urban Bazar (“Urban Bazar”) 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 Bitra Basir (“Basir”), who 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 Determination 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, Urban Bazar submits the Director erred in law in making the Determination. The appeal challenges nearly every element of the Determination on this ground, including the imposition of interest and the administrative penalties.
7. Urban Bazar also seeks a suspension of the effect of the Determination under section 113 of the *Act* pending a decision on this appeal.
8. 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

9. The issue is whether Urban Bazar has shown there is any reviewable error in the Determination.

THE FACTS

10. 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.
11. 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.
12. Basir ceased working at Urban Bazar when her husband sold his shares in the business.
13. In response to the complaint, Urban Bazar took the position that Basir 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.
14. 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.
15. 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.
16. 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 requirement found in sections 46 and 58, respectively, of the *Act*. The Director imposed administrative penalties based on the findings that Urban Bazar had contravened sections 17, 18 and 28 of the *Act* and interest on the wages under section 88 of the *Act*.

ARGUMENT AND ANALYSIS

17. 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.*

18. 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.
19. 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.
20. I shall provide a brief summary of each of the arguments made on behalf of Urban Bazar in this appeal and the response of the Director. Basir has also filed a response, but essentially it has used as another opportunity to relate her version of the facts. It provides an interesting contrast to the version of facts set out in the appeal, but is not helpful on the merits of the arguments made in the appeal. The appeal, appropriately in my view, does not challenge the conclusion that under the *Act* Basir was an employee of Urban Bazar from September 2005 to March 2006.
21. I will also point out at this time that an appeal to the Tribunal under Section 112 is not intended as an opportunity to have the Tribunal review and re-weigh the evidence, hoping a different conclusion will be reached. An appeal under the *Act* is intended to be an error correction process, with the grounds of review identified in section 112 and the burden of persuasion being on the appellant to identify the error on one of those grounds.
22. Counsel for Urban Bazar submits the claim was not made in good faith and should have been dismissed by the Director on that basis. It is also submitted that many of Basir's actions interfered with the ability of Urban Bazar to effectively manage its business and should have had a bearing on whether the Director denied Basir's claim under section 76(3) (c) of the *Act*. Implicit in this argument is the assertion that the Director erred in law in failing to do so.
23. In response, the Director says the allegation of bad faith was made by Urban Bazar during the complaint process, was considered in the Determination and was dismissed on the evidence. I have read that part of the Determination which the Director has identified as addressing the bad faith allegation. I can find no specific reference to a bad faith allegation. It may have been preferable if the reasons had been more direct and explicit regarding the allegation of bad faith, however, I am not convinced that the Delegate failed to consider the Employer's submission that the complaint was made in bad faith. I can infer from the reasons provided in the Determination that the Director dismissed the bad faith allegation on the conclusion that Basir's claim of performing work for Urban Bazar was genuine and meritorious, as opposed to being fabricated and made in bad faith.
24. In *Provident Security and Event Management Corp.*, BC EST # D279/01, The Tribunal wrote as follows about the purpose of Section 76(3) (c):

... the Director is not compelled or required by the *Act* to refuse to investigate or stop or postpone an investigation even if there is "bad faith" on the part of the complainant. It is a matter of discretion. Bearing in mind that the purpose of the *Act* and the statutory mandate of the Director to ensure employees receive at least minimum employment standards and that employers comply with the minimum requirements of the *Act*, it is consistent with that purpose for the Director to give consideration to the merits of a complaint before denying a complainant their rights under the statute

The purpose of Section 76(2) (c) [now 76(3) (c)] of the Act is not to refuse or discontinue investigation of valid employment standards claims. The purpose and objective of that provision is to allow the Director to prevent abuses of the legislation, where it is apparent that a complaint has been filed not for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In *Re Health Labour Relations Association of British Columbia et al v. Prins et al*, (1982), 140 D.L.R. (3d) 744 (B.C.S.C.), the Court stated, at page 748:

It would take the clearest kind of language to exclude the right of any citizen to the direct remedy furnished by this [the *Act*] legislation.

The same considerations would apply in Section 76(2) (c) [now 76(3) (c)]. It would take the clearest kind of circumstances to deny an employee the basic standards of compensation and conditions of employment provided by the *Act*.

25. As well, a decision under section 76 is discretionary. The Tribunal has consistently indicated that discretionary decisions by the Director will not lightly be interfered with: see *Joda M. Takarbe and others*, BC EST #D160/98.
26. No error of law has been shown and the appeal provides no other basis on which the Tribunal may interfere with the decision of the Director to accept and process the complaint.
27. Counsel for Urban Bazar challenges the decision of the Director to award Basir overtime wages, alleging Basir was a “manager” as that term is defined in the *Act* and as such she was not entitled to overtime wages.
28. In response, the Director says it was never argued during the complaint process that Basir was a “manager”. Rather, Urban Bazar argued her husband was her manager and she was not an employee of Urban Bazar.
29. I agree with the Director on this point. Whether an employee is a “manager” under the *Act* is primarily dependent on the facts. There are no facts, or findings of facts, in the Determination relating to this argument or to the question of whether Basir was a manager. Any attempt to seek to introduce evidence on this question at this stage would need to be considered in the context of the Tribunal’s view about accepting “new” evidence on an appeal that could have been provided during the complaint process. Even if I accepted the assertion in the appeal that Basir claimed she was “in charge”, that is an insufficient factual basis on which to address what is, even with a complete evidentiary foundation, often a complicated legal and factual analysis.
30. This argument is not accepted.
31. In the matter of decision of the Director to award Basir compensation for length of service, counsel for Urban Bazar says Basir was not fired or discharged, but simply left of her own accord, and without notice, when her husband sold his shares.
32. The Director says the central point in the Determination is not whether Basir was fired, discharged or quit, but that Urban Bazar had substantially altered a condition of employment by not paying wages and that under section 66 of the *Act* it was appropriate to consider her employment terminated.

33. I accept the conclusion in the Determination that a substantial alteration to a condition of employment can include the failure to pay wages for work performed. The exchange of labour for wages is not only the basic condition of an employment relationship, it is a statutory obligation, and the failure to meet this condition will almost invariably satisfy the requirements for a finding of termination under section 66. I am not persuaded there is any error of law in the decision of the Director to treat Basir's employment as terminated under section 66 of the *Act* and to award length of service compensation for that termination.
34. The balance of the appeal seeks an adjustment to the amounts owed for annual vacation and statutory holiday pay depending on the success of the above matters. Since Urban Bazar has not been successful on any of the arguments from which the annual vacation and statutory holiday pay was calculated, there is no basis for making any adjustments to these amounts.
35. Counsel for Urban Bazar submits that the interest should be reduced based on the bad faith of Basir and the administrative penalties imposed on Urban Bazar for contravening sections 18 and 28 should be levied only against Basir's husband.
36. In response, the Director points out that the administrative penalties were addressed in the Determination. There is no specific reference to the interest calculation.
37. Section 88 of the *Act* contains the provision relating to the imposition of interest on unpaid wages. Subsection 88(1) is relevant to the submission made in this appeal:
- 88** (1) *if an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of*
- (a) *the date the employment terminates, and*
- (b) *the date the complaint about the wages or other amount is delivered to the director.*
38. Interest is mandatory and it is payable by the employer, in this case Urban Bazar. There is no discretion in the Director or in the Tribunal to alter the requirement nor is there any statutory provision that would allow this requirement to be waived or adjusted for any reason: see *Insulpro Industries Inc. and Insulpro (Hub City) Ltd.*, BC EST #D405/98.
39. Administrative penalties are also mandatory. As stated by the Tribunal in *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST #D160/04:

Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are mandatory and are thus not subject to mediation. . . .

As the Tribunal recently noted in *Summit Security Group Ltd.*, BC EST #D059/04, (Reconsidered in BC EST #D133/04), administrative penalties under the *Act* are part of a larger scheme designed to regulate employment relationships in the non-union sector. The Tribunal determined that penalties are generally consistent with the purposes of the *Act*, and the design of the penalty scheme established under section 29 meets the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*.

40. Under section 98 of the *Act*, administrative penalties are imposed, at least initially, on “*a person in respect of whom the director makes a determination*”. In this case, that person is Urban Bazar. Once again, neither the Director nor the Tribunal have any discretion or authority to require a person other than the person described in section 98 to be liable for the administrative penalty. In certain circumstances, an employee, officer, director or agent of a corporation may be liable for an administrative penalty, but there is no basis in this appeal for considering whether such circumstances exist here as no Determination has been made relating to any of those persons.
41. These arguments are dismissed. In result, the appeal is dismissed.
42. In light of the decision reached on the appeal, it is unnecessary to consider the application to suspend the effect of the Determination pending appeal.

ORDER

43. 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*.

David B. Stevenson
Member
Employment Standards Tribunal