

An appeal

- by -

Dr. Bean Café Inc.

- 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:** Robert Groves

**FILE No.:** 2008A/131

**DATE OF DECISION:** January 30, 2009

## DECISION

### SUBMISSIONS

Maida Valkenier	on behalf of Dr. Bean Café Inc.
Jaspreet Bhatti	on her own behalf
Sherri Wilson	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal brought on behalf of Dr. Bean Cafe Inc. (the "Employer") by one of its principals, Maida Valkenier, challenging a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") on October 3, 2008. The Delegate concluded that one Jaspreet Bhatti ("Bhatti"), a former employee of the Employer, was owed wages, annual vacation pay, compensation for length of service and accumulated interest totaling \$1,279.35 pursuant to sections 18, 58, 63 and 88, respectively, of the *Employment Standards Act* (the "*Act*"). In addition, the Delegate imposed three administrative penalties of \$500.00 each arising from the Employer's contravening sections 18 and 27 of the *Act*, and section 46 of the *Employment Standards Regulation* (the "*Regulation*"). The total found to be owed in the Determination was therefore \$2,779.35.
2. I have before me the Employer's Appeal Form and attached submission, the Determination and the Reasons for the Determination, the record the Director says was before the Delegate at the time the Determination was being made, a submission from the Delegate, a submission from Ms. Bhatti, and a final submission from Ms. Valkenier.
3. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. I have concluded that this appeal shall be decided having regard to the written materials I have received, without an oral hearing.

### FACTS

4. Ms. Bhatti was employed by the Employer as a barista at its coffee shop business from October 16, 2006 to January 30, 2008. Her employment ended suddenly, and without notice, when the coffee shop ceased to operate on the latter date.
5. Ms. Bhatti told the Delegate that she was owed wages, annual vacation pay, and two weeks' compensation for length of service. She had no documentary material to support her claim, she said, because the Employer had not provided her with wage statements, contrary to section 27 of the *Act*.
6. During the course of her investigation the Delegate attempted to contact the Employer, without success. In the Reasons for the Determination the Delegate says that she attempted to contact "the company director" by telephone, but that the number she called was no longer in service. She also says that she

sent a letter outlining her preliminary findings and a Demand for Records to the Employer at a civic address, but it was returned when Canada Post could not locate the proper recipient at that location.

7. The Delegate conducted a corporate search for the Employer through the Registrar of Companies, which revealed that Ms. Valkenier and a Gurdeep Parhar were directors of the company. She then forwarded her preliminary findings and the Demand for Records to the attention of Ms. Valkenier and Mr. Parhar at the addresses for them specified in the corporate summary she obtained.
8. Regarding the materials forwarded to Ms. Valkenier, the record discloses that delivery of the preliminary findings letter was refused and it was returned to the Employment Standards Branch. As for the Demand for Records, the Canada Post information reveals that it was successfully delivered in the sense that an individual named Zhang Xi signed for it.
9. The materials sent to Mr. Parhar were returned to the Branch as he could not be located at the address noted.
10. The Delegate concluded that these efforts to contact the Employer were sufficient to satisfy her obligation mandated by section 77 of the *Act* to give the Employer a reasonable opportunity to respond to Ms. Bhatti's complaint. Having received no communication from the Employer, the Delegate relied on the information provided to her by Ms. Bhatti, which she found to be reliable, and issued the Determination.
11. It is clear from the material which the Employer has delivered to the Tribunal for the purposes of this appeal that the Employer does not dispute Ms. Bhatti's entitlement to the amount stipulated in the Determination to be owed for wages, vacation pay, compensation for length of service, and interest. Indeed, the Employer has deposited the sum of \$1,279.35 in trust pending the result of this appeal. What the Employer disputes is the imposition of the three administrative penalties totaling \$1,500.00.

## ISSUES

12. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

## ANALYSIS

13. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

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 being made.

14. Section 115(1) of the *Act* should also be noted. It says this:
- 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
  - (b) refer the matter back to the director.
15. The Employer's Appeal Form discloses that it challenges the Determination under sections 112(1)(b) and (c). While these are distinct grounds of appeal, I believe that the focus of the Employer's concern relates to what it considers to be the failure on the part of the Delegate to provide it with notice of the investigation, which resulted in the Employer's being deprived of an opportunity to respond. I infer the Employer's argument on the issue of new evidence to be that since it did not receive the communications directed to it by the Delegate during the course of the investigation, it could not tender the information at that time which it would like to have considered now. That information appears to be limited to an argument that the Delegate erred in finding that the Employer neglected to provide Ms. Bhatti with wage statements as required under section 27 of the *Act*, and an assertion that it did not respond to the Demand for Records. As I have stated earlier, the Employer takes no issue with the Delegate's conclusion that Ms. Bhatti is owed wages, vacation pay, compensation for length of service, and interest.
16. A challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by the Director and his delegates was unfair. The principles of natural justice mandate that a party must have an opportunity to know the case he is required to meet, and an opportunity to be heard in reply. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond.
17. The Employer argues that no notice of the Delegate's investigation was communicated to it, or to its principals, and that it therefore had no opportunity to state its case to the Delegate, or to provide the materials requested of it. It says that the written materials mailed to the civic address where the coffee shop operated did not reach the Employer because the Employer's landlord had changed the locks when the business was closed, which meant that the Employer could not retrieve any mail delivered there. It says that in 2003 Ms. Valkenier moved from the address to which the Delegate sent the preliminary findings letter and Demand for Records, and that the individual Zhang Xi is unknown to her. It also says that in 2004 Mr. Parhar moved from the address to which the Delegate sent the same material to him. The Employer says that none of the correspondence forwarded by the Delegate came to its attention until the Determination was forwarded to its registered and records office at 1608 West 28th Avenue in Vancouver.
18. The Employer denies that Ms. Valkenier received any telephone calls from the Delegate, and it asserts that the contact information for her provided to the Delegate by Ms. Bhatti was incorrect.

19. In reply, the Delegate says this in her submission:

...Numerous attempts were made to contact Ms. Valkenier by telephone.

Additionally, the employer and its directors were contacted at the addresses on BC Company Summary for Dr. Bean Cafe Inc. The Summary was printed on May 9, 2008 and the currency date was April 22, 2008. It is respectfully submitted that the director's failure to file annual reports with the corporate registry should not adversely affect the employee.

20. It is clear that the Delegate sent the preliminary findings letter and the Demand for Records to the civic address where the Employer had carried on its business, and to two of its directors at the addresses for them which appeared on the corporate summary for the Employer that she had obtained through the search she had conducted. I also have no doubt that the Delegate did attempt to make contact with Ms. Valkenier by telephone at the number provided to her by Ms. Bhatti. In the end, none of these efforts bore fruit.

21. The Delegate forwarded the preliminary findings letter and the Demand for Records via registered mail. Section 122 of the *Act* provides that service of a Demand may be effected by registered mail, and where such a process is utilized the Demand is deemed to be served 8 days after it is deposited in a Canada Post office.

22. Previous decisions of the Tribunal have decided, however, that the presumption of deemed service under section 122 is rebuttable (see, for example, *Re Diamond* BC EST #D108/04; *Him-Mat Enterprises Ltd.* BC EST #123/03).

23. Notwithstanding the Delegate took steps to apprise the Employer of her investigation, I have decided that the evidence in this case supports a conclusion that the section 122 presumption has been rebutted. I have also decided that the circumstances warrant a finding that the efforts made by the Delegate to provide notice of the complaint to the Employer, and an opportunity for it to respond, were not, in the circumstances, reasonable.

24. In my view, what constitutes reasonable efforts is an elastic concept, the content of which will vary depending on the facts of the particular case at hand. Here, the Delegate says she attempted to contact a director of the Employer but the number was no longer in service. She forwarded a letter and Demand by registered mail to what she believed to be the civic address for the Employer, but the material was returned. The record is unclear as to where the Delegate obtained this address from. I could find no indication that it came from the Employer. In any event, the Delegate knew that the coffee shop business had closed its doors suddenly, and the Employer's submissions on this appeal make it clear that the Employer would not have received mail at its business premises thereafter because the landlord had changed the locks.

25. The Delegate knew that delivery of a letter sent to Ms. Valkenier as a director of the Employer at the address listed for her on the corporate summary had been refused, but the Delegate did not know by whom. A subsequent Demand sent to the same address was signed for by an individual named Zhang Xi, whom no one has associated with the Employer in these proceedings. Ms. Valkenier has said, and no one disputes, that she had moved from the premises in question some time previously and that the person Xi is unknown to her. While it is unnecessary to decide the question, one may infer that Xi was the occupant of the premises at that address at the time the Demand was delivered.

26. As for the material sent to Mr. Parhar as a director of the Employer at the address noted for him on the corporate summary, it was returned to the Delegate, and I note that on the envelope addressed to him which appears in the record, and on which the return particulars are noted, the word "moved" is written. The Employer has stated, and no one disputes, that Mr. Parhar had moved from that location prior to the delivery of the material prepared by the Delegate.
27. I agree that the Delegate was entitled to rely on the information regarding the addresses of the directors of the Employer that appeared on the corporate summary, at least to a point. I also agree that a large part of the reason why the Delegate's correspondence did not reach the Employer was that the Employer did not properly update its corporate records. I have concluded, in the peculiar circumstances of this case, however, that none of these attempts on the part of the Delegate to make contact with the Employer could have led her to believe with confidence that the Employer had actually received notice of Ms. Bhatti's claim, or the Demand for Records, and the evidence is that it did not.
28. What, then, should the Delegate have done? I am of the view that a person in her position, acting reasonably, would have sought to contact the Employer at the other address available to her, before issuing the Determination. There was one other address that was known to her at that time. It also appeared on the corporate summary. It was the address of the registered and records office for the Employer at 1608 West 28th Avenue in Vancouver. The president of the Employer, one Anita Parhar, was also listed at that address on the corporate summary. The Delegate does not appear to have forwarded any material to the Employer or to Ms. Parhar at that address prior to issuing the Determination. Curiously, the record reveals that the Delegate did send the Determination to that address, and it was because she did so that the Employer says it became aware, too late, that an investigation had been conducted.
29. In the result, there are parts of the Determination which I do not believe can stand. I say parts because the Employer has conceded that Ms. Bhatti is entitled to payment for the amounts set out in the Determination in respect of wages, vacation pay, compensation for length of service and interest. That part of the Determination is confirmed.
30. As for the administrative penalties, there is no question that the Employer did not pay the wages to which Ms. Bhatti was entitled as required under section 18 of the *Act*. The part of the Determination which imposes an administrative penalty in respect of that contravention is confirmed.
31. The part of the Determination which imposes an administrative penalty in respect of the failure of the Employer to respond to the Demand for Records is cancelled.
32. The part of the Determination which imposes an administrative penalty because the Employer did not provide wage statements to Ms. Bhatti is referred back to the Director for further investigation. The Delegate imposed the penalty on the strength of Ms. Bhatti's statement that wage statements were never provided to her. The Employer asserts in its submissions on the appeal that this statement is untrue, and that statements were delivered. The information before me is insufficient to permit me to determine whether there has been a contravention of section 27 of the *Act*.

**ORDER**

33. Pursuant to section 115 of the *Act*, I order as follows:
- that part of the Determination which requires the Employer to pay wages, vacation pay, compensation for length of service and interest to Ms. Bhatti is confirmed;
  - that part of the Determination which imposes an administrative penalty for the Employer's failure to pay wages as required is confirmed;
  - that part of the Determination which imposes an administrative penalty for the Employer's failure to respond to a Demand for Records is cancelled;
  - that part of the Determination which imposes an administrative penalty for the Employer's failure to provide wage statements to Ms. Bhatti is referred back to the Director for further investigation.

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**Robert Groves**  
**Member**  
**Employment Standards Tribunal**