

An appeal

- by -

Carolyn Anne Macdonald operating as Bukowski's Restaurant

- 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.:** 2005A/165

**DATE OF DECISION:** February 17, 2006

## DECISION

### SUBMISSIONS

M.J. (Peggy) O'Brien, Lawson Lundell	on behalf of Carolyn MacDonald
Michelle Alman	on behalf of the Director of Employment Standards
Stacy Bestard	on her own behalf

### OVERVIEW

1. This is an appeal by Carolyn Anne MacDonald, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued August 4, 2005.
2. Stacy Bestard was employed as the General Manager of Bukowski's Restaurant ("Bukowski's"). Bukowski's was operated by Bukowski's Ventures Ltd. ("Ventures"), owned by Gus Vassos. Ms. MacDonald was a party to a General Security Agreement ("GSA") with Ventures.
3. On February 6, 2004, Ms. MacDonald seized the restaurant's assets under the GSA when Ventures defaulted on a loan payment. Although the record is not clear on this point, it appears that Ms. MacDonald's agent, Jack Savage, operated Bukowski's as a going concern on her behalf from February 6<sup>th</sup>. On February 16, 2004, Ms. MacDonald incorporated Fly By Night Operations Inc. ("Fly By Night"), which purchased Ventures' assets. Bukowski's was managed and control by Mr. Savage and Fly By Night after that date.
4. On February 10, 2004, Mr. Savage told Ms. Bestard that her former employer was no longer operating the business, and the new operators had no need for her services.
5. Ms. Bestard complained to the Director of Employment Standards that Ms. MacDonald had failed to pay her regular wages, annual vacation pay, compensation for length of service and compensation for employer's business costs.
6. Following an investigation of the complaint, the Director's delegate determined that Ms. Bestard continued as an employee of the business until February 10, 2004. He concluded that Ms. Bestard's employment was continuous and uninterrupted by the disposition under section 97 of the Act, and that she was entitled to wages, compensation for length of service, annual vacation pay and employer business costs. The delegate determined that Ms. Bestard was entitled to wages and interest in the total amount of \$18,253.36.
7. The delegate also imposed three \$500 penalties on "Carolyn Anne MacDonald operating as Bukowski's Restaurant" for contraventions of sections 18, 21 and 63 the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
8. Ms. MacDonald appealed five of the delegate's conclusions. She also sought an oral hearing on the issue of whether Ms. Bestard was entitled to wages, and if so, in what amount.

9. I first considered the issue of whether the delegate erred in law in finding that Ms. MacDonald's seizure of the restaurants assets is a disposition of a business within the meaning of section 97 of the *Act*. I advised the parties that, if I decided that the delegate had not erred on that point, I would consider the remaining issues as well as Ms. MacDonald's request for an oral hearing.
10. As I have decided that the delegate did not err in his conclusion on this issue (BC EST #D193/05), this decision addresses the outstanding issues. In arriving at my decision, I have reviewed the appeal document and attached submission, additional submissions of counsel for Ms. MacDonald and the Director, a submission by Ms. Bestard, the section 112(5) "record", and the Reasons for the Determination. For the reasons that follow, I am not persuaded that an oral hearing is necessary.

## ISSUES

- Did the delegate err in finding that Ms. Bestard's employment did not have to be continued for section 97 of the *Act* to apply?
  - Did the delegate breach the principles of natural justice in failing to require evidence in support of Ms. Bestard's claims and in concluding that Ms. Bestard was owed wages and business expense reimbursements?
11. Ms. MacDonald also contended that the delegate erred in finding that Ms. Bestard was an employee of Ventures. However, that issue was not referred to in subsequent submissions and I infer it is no longer being advanced as a ground of appeal.

## THE FACTS AND ARGUMENT

12. Background facts have been set out in my previous decision. These facts relate to the remaining issues under appeal.

### *Continuation of employment*

13. When Ms. MacDonald seized the assets of the restaurant on February 6, 2004, Ms. Bestard was on her days off. Ms. Savage left Ms. Bestard a telephone message asking her to contact him as soon as possible. Ms. Bestard returned Mr. Savage's call on February 8, and Mr. Savage asked to meet with her. The parties met on February 10, 2004, at which time Mr. Savage advised her that her former employer was no longer operating the restaurant, and the new owner had no further need of her services.
14. Counsel for Ms. MacDonald contends that, where there is a change in an employer, the termination of all employees is automatic. She relies on *B.C.G.E.U. v. British Columbia (Industrial Relations Council)*, [1988] B.C.J. No 2009 (Q.L.), 33 B.C.L.R. (2d) 1 (C.A.) in which the court set aside the Council's decision that an employee's services could be transferred from the former government employer to a private society without the employee's consent.
15. Counsel for the Director relies on *GMAC Commercial Credit Corp. – Canada v. T.C.T. Logistics Inc.* [2004] O.J. No. 1353 where the Ontario Court of Appeal found that an interim receiver of a business in bankruptcy was liable as a successor employer under Ontario's *Labour Relations Act*.

*Natural justice and new evidence*

16. In her complaint dated February 11, 2004, Ms. Bestard claimed that she was owed wages from October 15, 2003 until February 4, 2004 in the total amount of \$8,931.42, annual vacation pay and compensation for length of service. She also alleged that she was owed reimbursement for expenses, and that she could not provide receipts for those purchases as they were at her desk and Mr. Savage had denied her access to them.
17. Mr. Savage's response was to deny that Ms. Bestard was an employee of Bukowski's:
- We wish to inform the Employment Standards Branch that Ms. Bestard has never been employed by Ms. Macdonald personally nor through her operating company, Fly By Night Operations Inc. Ms. Bestard should be seeking remedy [sic] from her employer whose current address or status is unknown to us..."
18. On May 4, 2004, the delegate wrote to Mr. Savage setting out each of Ms. Bestard's claims and requested Mr. Savage's response to those allegations. He also requested that Mr. Savage provide him with Ms. Bestard's employment records.
19. In a May 24, 2004 letter Mr. Savage again denied that Ms. MacDonald or Fly By Night was Ms. Bestard's employer, and questioned the reliability or validity of Ms. Bestard's claims. He stated that he had never seen or possessed any employment records and was unaware of their location. He suggested that Ms. Bestard, as the former manager of Bukowski's, would have access to the records.
20. On August 5, 2004, the delegate requested Ms. Bestard's T-4 statements for 2003 and 2004, and August 5, 2003-February 4, 2004 payroll records from Bukowski's accountant, Nicki Ershad.
21. Ms. Ershad provided the delegate with a one page sheet setting out Ms. Bestard's wages payable from January 1, 2003 until February 14, 2004, along with T-4 slips for 2003 and 2004. Those records indicated an amount of \$10,944.75 net payable to Ms. Bestard, but did not set out specific annual vacation pay information.
22. In a letter dated September 7, 2004, the delegate provided Mr. Savage with an outline of the facts as he understood them, his preliminary findings and the payroll information provided by Ms. Ershad, and asked Mr. Savage to review and clarify or correct his information if necessary:

... it is the position of the Employment Standards Branch that Ms. Bestard continued as an employee on and after the date of the disposition of the business.... She continued in an employee status until February 10<sup>th</sup> when you dismissed her without notice. Her employment status therefore satisfies the provisions of Section 97 of the Act in that her employment was "continuous and uninterrupted by the disposition".

The impact of this position is that under Section 97 the successor assumes all wage liabilities under the Act, including unpaid regular wages, unpaid annual vacation, termination compensation and the employer's business costs under section 21(2) of the Act...

I would appreciate hearing from you within 15 days of the date of this letter on any matter raised within this letter or relevant to the issues before us...

23. In his October 18, 2005 response, although Mr. Savage challenged several of the delegate's factual assumptions, primarily with respect to the identity of Ms. Bestard's employer, he did not respond to the payroll information the delegate provided to him. He did dispute Ms. Bestard's claims for reimbursement, suggesting that many of the staff took advantage of the Liquor Branch billing number. He also claimed that none of the purchased items benefited the restaurant.
24. After concluding that Ms. Bestard was an employee prior to, during and subsequent to the disposition of the business on February 6, 2004, the delegate reviewed the accountant's payroll records, and concluded, on a balance of probabilities, that Ms. Bestard worked the hours she claimed and within the times provided. He determined that she was entitled to wages in the amount of \$12,599.90. He also found her entitled to vacation pay in the amount of \$1,873.22 and employer business costs for liquor purchases and hardware store in the amount of \$1,053.58. The delegate also found that Ms. Bestard was entitled to compensation for length of service since neither Vassos nor Ventures had provided her with written working notice of the termination of her employment, and Mr. Savage had simply told her that her services were no longer needed.
25. In her appeal document, Ms. MacDonald argues that Ms. Bestard was not an employee of Ventures or Vassos; rather, she contends that Ms. Bestard and Mr. Vassos had some other form of contractual relationship, that Ms. Bestard's employment did not have to be continued for s. 97 to apply, and that the delegate breached the rules of natural justice and procedural fairness. As noted above, the first issue was not pursued in subsequent appeal submissions and I have not addressed it here.
26. In her November 10, 2005 reply submission, counsel for Ms. MacDonald argues that the delegate failed to require evidence in support of Ms. Bestard's claims, and submits that, on the evidence before the delegate, it could not be reasonably concluded that the amounts were owing to her on a balance of probabilities. She submits that the conclusions were based on wrong information, and that the decision should be set aside.
27. Attached to the reply submission were three pages that had not previously been provided to the delegate: a December 17, 2003 fax from Ms. Ershad to a third party consisting of a cover sheet with a memo and a draft balance sheet for the period ending November 30, 2003, and one page copy of a bank statement for Ms. MacDonald for the period January 30 – February 27, 2004. The fax and accompanying sheet had been attached as exhibits to an affidavit sworn by Ms. MacDonald on January 17, 2004.
28. Counsel submits that Ms. MacDonald and Mr. Savage co-operated with the delegate as best they could by providing what documents were available to them, and that neither of them had the ability to compel Bukowski's accountant to produce the records. She says that Ms. Ershad should be subject to cross examination on payments made to Ms. Bestard, as well as the financial statements in light of this new information. She submits that the payroll records are the kind of "new evidence" contemplated by *Armstrong v. Armstrong* (1992), 74 B.C.L.R. (2d) 273 (C.A.) and *Matthew McGreish* (BC EST #D031/05), and that a miscarriage of justice will occur if such evidence is not admitted.
29. Counsel also argues that Ms. MacDonald ought to be entitled to subpoena restaurant employees who could give evidence on Ms. Bestard's hours of work.
30. Counsel for the Director argues that the "new evidence" offered by Ms. MacDonald does not fit within the Tribunal's test for new evidence. She says that the attachments to counsel's November 10, 2005 submission were all available to Ms. MacDonald well before the August 4, 2004 Determination. She

submits that the *Act's* purpose of providing fair and efficient procedures for resolving disputes (s. 2(d)) would be defeated if Ms. MacDonald were permitted to use formerly available evidence to address concerns she now has with the Determination. The Director's counsel also relies on the Tribunal's decisions denying previously non-cooperative appellants or their agents attempts to introduce new evidence on appeal.

31. Counsel for the Director says that the attachments to the reply submissions belie Ms. MacDonald's knowledge about Bukowski's financial situation, and argues that the new evidence should not be admitted to support the request for an oral hearing.
32. Counsel for the Director submits that although Savage had seized Bukowski's assets and operations as well as its "data records", he provided no information that might have been relevant to Ms. Bestard's claim. She submits that at no time did Ms. MacDonald or her agent, Mr. Savage, ever question the accuracy of the payroll records or the T-4's. Counsel says that the delegate relied on information provided by Ms. Ershad confirming Ms. Bestard's wage claim and that the time for expressing any concerns about that evidence was during the investigation, not on appeal. Counsel further submits that any arguments respecting Ms. Bestard's claim for reimbursement for liquor entitlement should have been raised before the delegate, and, given that Ms. MacDonald would have been obliged to conduct a liquor inventory at the time of takeover, any concerns about her entitlement ought to have been apparent during the investigation.
33. Finally, counsel submits that the records Ms. MacDonald now attempts to submit may very well have assisted the delegate in addressing Ms. Bestard's wage claim, and that holding an oral hearing at this point would only prolong the disposition of the appeal. She says that the delegate's decision was well supported by the best available evidence.

### ***Penalty imposition***

34. Counsel for Ms. MacDonald contends that the legislature could not have intended to impose penalties on a citizen of British Columbia for breaching the *Act* between October 15, 2003 until February 4, 2004 when she had nothing to do with Ventures during that period. She submits that no secured creditor would assume the risk that, should it seize assets, it may be held responsible for all outstanding debts of the debtor to its employees as well as the risk of facing significant fines and penalties as a result of the actions of the debtor. Further, she says that Ms. Bestard herself agreed that she chose not to pay herself because she was aware the restaurant was in financial difficulty, and that Ms. MacDonald ought to be held responsible for that contravention.
35. Counsel for the Director submits that the transfer of ongoing liability for employee wages under section 97 brings with it the potential liability for prior *Act* contraventions by the previous business owner.
36. Ms. Bestard's submissions relate essentially to the issue of whether she was an employee, which I need not refer to for the purposes of this decision.

## ANALYSIS AND DECISION

37. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made

***Did the delegate err in finding that Ms. Bestard's employment did not have to be continued for section 97 of the Act to apply?***

38. Counsel for Ms. MacDonald relies on a 1988 B.C.C.A. decision that considers the proper interpretation of a successorship provision of the *Industrial Relations Act* upon the sale or purchase of a business. Counsel for the Director relies on a 2005 Ontario C.A. decision also relating to the interpretation of a successorship provision of the *Labour Relations Code* where a business is in bankruptcy.

39. The *Act* is remedial legislation, and as such, must be given such large and liberal interpretation as best ensure the attainment of its objects (see section 8 of the *Interpretation Act*). A major purpose of the *Act* is to give protection to employees for the payment of their wages where an employer is in receivership or bankruptcy, which is at issue in this case.

40. As the Tribunal noted in *Lari Mitchell* (BC EST #RD107/98, upheld [1998] B.C.J. No. 3005 B.C. S.C. (Q.L.)) the *BCGEU* case involved the interpretation of section 53 of the *Industrial Relations Act* which governs industrial relations in the province, not employment standards. The Tribunal noted that section 53 dealt, in large measure, with the preservation of collective bargaining rights upon the disposition of a business; not with the protection of minimum standards of employment. The Tribunal further distinguished the *BCGEU* decision by noting that the language used in section 53 is markedly different than the wording of section 97.

41. Mr. Savage did not terminate Ms. Bestard's employment until he met with her on February 10, 2004. Even though Ms. Bestard was on her days off from the date of the seizure of assets until February 10, 2004, I find that her employment status did not change by virtue of that seizure. Mr. Savage did not give Ms. Bestard sufficient written notice of termination, pay in lieu of that notice, or any combination of notice and pay, and I find that the delegate did not err in awarding Ms. Bestard compensation for length of service.

***Did the delegate breach the principles of natural justice in failing to require evidence in support of Ms. Bestard's claims and in concluding that Ms. Bestard was owed wages and business expense reimbursements?***

42. The record discloses that the delegate repeatedly sought information from Mr. Savage about Ms. Bestard's claim for wages. Mr. Savage did not provide the delegate with any information, and the delegate sought payroll records from Bukowski's accountant. Those documents were provided to Mr. Savage for comment. Other than continuing to deny that Ms. Bestard was an employee, Mr. Savage did

not challenge the veracity or accuracy of the information, other than to suggest that Ms. Bestard's claim lacked "credibility" because she had not sought payment earlier.

43. Not only does Ms. MacDonald now criticize the delegate for an alleged failure to take further steps to investigate the claim, she raises, for the first time, questions about those documents. She suggests that the amounts declared in the 2003 and 2004 T4's are contradictory and needs to be tested by way of cross-examination. She also suggests that Ms. Ershad did not prepare the employee detail sheet she produced, and that she should be subjected to cross examination on that document.

44. This Tribunal has long held that a failure to participate in an investigation cannot be relied upon to support a ground of appeal (*Tri-West Tractor Ltd.* (BC EST #D268/96) and *Kaiser Stables* (BC EST #D058/97)). I find no merit to Ms. MacDonald's claim that she was not given full disclosure of the case against her, the right to present evidence and the right to be heard by an independent decision maker. The delegate sought independent verification of Ms. Bestard's claims after failing to get a substantive response from Mr. Savage, and arrived at a reasoned conclusion based on the best evidence available to him.

45. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- 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;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- 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.

46. Counsel for Ms. MacDonald says that the test for new evidence must be subject to the overriding principle that a miscarriage of justice must not occur (*Canada Safeway Ltd. v. Surrey (City)* (2004), 1 M.P.L.R. (4<sup>th</sup>) 195). As the court in *Canada Safeway* notes however, the fourth criterion is related to this overriding factor, since if the evidence could change the result, it would be a miscarriage of justice to exclude that evidence.

47. In her reply submissions of November 10, 2005, counsel submits, for the first time, documents that were in Ms. MacDonald's possession since at least January 2004, at which time the delegate was seeking her response about Ms. Bestard's claim. Ms. MacDonald provides no explanation as to why the documents were not provided to the delegate during the investigation, nor what due diligence she exercised to locate this or any other evidence that might have assisted the delegate. That Ms. MacDonald had these documents in early 2004 belies counsel's argument that Ms. MacDonald and Mr. Savage co-operated with the delegate and gave him all the documents they had. For Ms. MacDonald to say, as she does, that she could not produce records relating to Ms. Bestard's employment because she was a mere secured creditor is disingenuous at best. The "new evidence" suggests that she had access to Bukowski's financial statements on at least one prior occasion. Furthermore, although Mr. Savage repeatedly denied that he had



any information that might have assisted the delegate, he clearly had access to some records and documents by virtue of the seizure of the restaurant's assets.

48. The new evidence fails the first criterion. I am also not persuaded that the new evidence meets the last criterion.
49. Ms. Ershad's memo refers to Ms. Bestard as the "bookkeeper" and notes that she is on vacation as of December 17, 2003. The draft financial record also suggests that there was outstanding wages in the amount of \$1295.86, which, if Ms. Bestard was claiming outstanding wages for part of October and all of November, was somewhat less than she was awarded for that period of time. Nevertheless, subsequent information provided to the delegate by Ms. Ershad, including T4 statements and an employee detail sheet, confirm the amounts claimed by Ms. Bestard for wages and vacation pay.
50. Ms. MacDonald does not dispute Ms. Bestard's entitlement to wages, nor does it appear that she disputes her entitlement to reimbursement for some expenses. For the purposes of applying the new evidence test, I am unable to find that the delegate erred in his conclusions on this issue.
51. Ms. MacDonald's disagreement relates to the accuracy of the amounts determined owing by the delegate, not the fact that wages are owed. It may be that the actual amounts owed to Ms. Bestard are somewhat different than those calculated by the delegate. However, the record shows that he applied his best judgement to the best evidence available to him and arrived at a reasoned decision. The calculations may not be mathematically precise, but I am unable to find that they are so distorted that an oral hearing should be held. One of the purposes of the *Act* is to provide fair and efficient procedures for resolving disputes (s. 2(d)). In my view, this purpose would not be met by holding an oral hearing in these circumstances where a more accurate calculation may have been made had Ms. MacDonald co-operated with the delegate during the investigation.
52. The bank account summary shows a payment by Ms. MacDonald to BC Liquor on February 9, 2004. Counsel submits that the validity of Ms. Bestard's claim for reimbursement for liquor payments is brought into question by this new evidence, and suggests that the liquor ordered and paid for by Ms. Bestard was never delivered. She contends that an oral hearing is necessary to subpoena BC Liquor records to determine whether the order made by Ms. Bestard was shipped to Bukowski's. This "new evidence" establishes only that Ms. MacDonald purchased liquor on February 9, 2004, several days after she seized the assets of the restaurant and during a period Ms. Bestard was not working. In my view, it would not have led the Director to a different conclusion on Ms. Bestard's claim. The evidence before the delegate satisfied him that Ms. Bestard had incurred personal costs for restaurant's benefit. Although Mr. Savage denied that the purchased items had arrived at the restaurant, the delegate relied on Ms. Bestard's evidence that products that arrived were checked against the itemized order sheet by the bar manager, and that record was kept by the employer. Ms. MacDonald presented no contrary evidence, either through documents seized or affidavits from current employees, all of whom were kept on. If liquor which had been ordered had not been shipped, that is an issue for Ms. MacDonald to pursue with BC Liquor, or by way of civil remedies against Ms. Bestard if necessary.
53. In summary, I am not persuaded that the appellant has met the test for the introduction of new evidence. I am also not persuaded that it would be a miscarriage of justice to exclude the new evidence. I find no basis to order an oral hearing.

***Penalties***

54. The delegate imposed three administrative penalties on Ms. MacDonald. Those were for contraventions of sections 18, 21 and 63 of the Act. Those sections are as follows:

- 18** (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.
- (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.
- 21** (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
- (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
- (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.
- 63** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
- (2) The employer's liability for compensation for length of service increases as follows:
- (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
- (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
- (3) The liability is deemed to be discharged if the employee
- (a) is given written notice of termination as follows:
- (i) one week's notice after 3 consecutive months of employment;
- (ii) 2 weeks' notice after 12 consecutive months of employment;
- (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
- (b) is given a combination of written notice under subsection (3) (a) and money equivalent to the amount the employer is liable to pay, or
- (c) terminates the employment, retires from employment, or is dismissed for just cause.

...

55. Ms. MacDonald became the employer on February 6<sup>th</sup>. Ms. Bestard's employment was terminated on February 10<sup>th</sup>. Ms. MacDonald did not pay Ms. Bestard all outstanding wages outstanding within 48 hours of that date, nor did she give her compensation for length of service or proper written notice of termination. Ms. Bestard's claimed reimbursement for business costs from Ms. MacDonald which were not paid, despite the claim and knowledge of the delegate's preliminary conclusions on this point.

56. All of the contraventions occurred after Ms. MacDonald seized the assets of Bukowski's and became a successor employer under section 97 of the *Act*. Therefore, I find no error in the delegate's imposition of three administrative penalties.
57. I deny the appeal.

**ORDER**

58. I Order, pursuant to Section 115 of the *Act*, that the Determination dated August 4, 2005 be confirmed in the amount of \$19,753.36, plus whatever interest might have accrued since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**