

An appeal

- by -

John Burgess Duncan carrying on business as
Dad's Homemade Soup's and Sangy's
("Dad's")

- 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.: 2016A/164

DATE OF DECISION: February 21, 2017

DECISION

SUBMISSIONS

John Burgess Duncan on his own behalf carrying on business as Dad's Soup's and Sangy's

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), John Burgess Duncan carrying on business as Dad's Homemade Soup's and Sangy's ("Dad's") has filed an appeal of a Determination issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on August 12, 2016. In that Determination, the Director found that Dad's had contravened sections 17, 18, 45, 58 and 63 of the *Act* in failing to pay Debra R. Jarrett \$588.73, representing wages, statutory holiday pay, annual vacation pay, compensation for length of service and interest. The Director also imposed four administrative penalties in the total amount of \$2,000 for the contraventions, for a total amount owing of \$2,588.73.
2. The date for filing an appeal of the Determination was September 19, 2016. Dad's appeal was filed November 30, 2016. Dad's has sought an extension of time in which to file the appeal.
3. Dad's appeals the Determination contending that the delegate erred in law in finding Ms. Jarrett to be an employee, and failed to observe principles of natural justice in making the Determination. Dad's also contends that evidence has become available that was not available at the time the Determination was being made.
4. This decision is based on Mr. Duncan's submissions, the section 112(5) "record" that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

5. Mr. Duncan, the sole proprietor of Dad's, operates two restaurants in Victoria. Ms. Jarrett was employed as a server, cleaner and food preparer from approximately October 3, 2014, until February 3, 2016.
6. On February 26, 2016, Ms. Jarrett filed a complaint alleging that Dad's contravened the *Act* by failing to pay her regular wages, compensation for length of service and statutory holiday pay.
7. The delegate held a hearing into Ms. Jarrett's complaint on May 12, 2016, by telephone. The parties were self-represented at that hearing. The delegate noted that Mr. Duncan was unhappy with the Employment Standards Branch's process, referring to the hearing as a "kangaroo court." He further expressed his view that he was not fairly represented at the hearing.
8. The delegate noted that, during the hearing, Mr. Duncan continued to work and conduct his business. The delegate also noted that Mr. Duncan spoke over Ms. Jarrett, made snide remarks, laughed and was generally combative.

9. The evidence before the delegate may be summarized as follows:

Wages

10. Although Ms. Jarrett worked at one of Dad's restaurant locations, she often stopped at the other location on her way to and from work to transport supplies or food. She said that she stopped at the first location on her way to work approximately 80% of the time, and on her way home from work approximately 50% of the time. On occasion, on her way to her work location, the food was not yet ready and she was asked to wait for it. In Ms. Jarrett's estimation, the drive between the locations took about 10 minutes, while Mr. Duncan contended the trip was between three and 10 minutes. Ms. Jarrett said that she arrived at her workplace in time for the start of her shift, and the transport time was outside of her regular work hours. She denied that she was paid for this time. She also denied that she was ever late for her regularly scheduled shifts. Mr. Duncan's evidence was that Ms. Jarrett transported supplies while on shift, often arriving at her work one half hour late, and that she was paid for all wages owing.
11. Ms. Jarrett claimed wages for 15 minutes in addition to her regular shift hours. She kept a personal diary in which she recorded how much she earned in gratuities and the hours she worked each day. She transferred those hours into a calendar she submitted as evidence at the hearing. Mr. Duncan agreed that the calendar was, for the most part, an accurate reflection of Ms. Jarrett's hours of work. However, he disputed the number of days Ms. Jarrett recorded as having worked, stating that she only worked three days per week. Dad's did not maintain accurate records of the hours Ms. Jarrett worked.
12. Ms. Jarrett also claimed statutory holiday pay for Thanksgiving, October 2015.

Compensation for length of service

13. Ms. Jarrett was unable to work on February 2, 2016, due to illness. As she did not have Mr. Duncan's contact number, she sent a text message to one of her co-workers, whom she considered a site manager, asking her to inform Mr. Duncan. Mr. Duncan then called Ms. Jarrett at home. Ms. Jarrett's father answered the phone and she instructed him to tell Mr. Duncan that she was too ill to speak but that she would talk to him the following day.
14. The following day when Ms. Jarrett stopped in at the first restaurant location to pick up supplies, Mr. Duncan confronted her about not giving him sufficient notice of her inability to work her shift. The conversation became "heated" and Ms. Jarrett told Mr. Duncan that if he had a problem with her he could fire her. Ms. Jarrett denied that she swore at Mr. Duncan or told him that she quit.
15. Ms. Jarrett went to the second restaurant location and worked her shift. Later that night, she received a text from Mr. Duncan that stated, in part "...after our confrontation this morning and you drove off without talking to me, I feel that it would be best for both of us that I end your employment with Dads...".
16. Mr. Duncan stated that Ms. Jarrett was dismissed because, during the conversation, Ms. Jarrett told him "*if you don't like it, you can fucking fire me*" then drove off. Mr. Duncan also told the delegate that, as far as he was concerned, Ms. Jarrett quit by giving him a reason to fire her. Mr. Duncan asserted that this was not the first time Ms. Jarrett had told him that if he did not like something she did he could fire her.
17. Mr. Duncan contended that Ms. Jarrett had been unable to fulfill her duties for four months prior to the termination of her employment, saying that her performance had started to "slip" and that her attitude had

become progressively worse. He said that she was unable to lift trays with dishes, and often let other staff do her work. He also contended that she demonstrated a lack of respect for him in front of other employees.

18. Mr. Duncan further said that Ms. Jarrett occasionally showed up late for work, was not always available as required and cancelled shifts at last minute. He said she took time off work for a few weeks to travel that extended to two months.
19. Mr. Duncan said that Ms. Jarrett was obliged to inform him, rather than a co-worker, that she was unable to work.
20. Although Mr. Duncan said that a few weeks prior to this incident, he had made it clear to Ms. Jarrett that some of her actions were unacceptable, he agreed that she had not been punished for her conduct. Mr. Duncan also never notified Ms. Jarrett in writing that her employment was in jeopardy.
21. The delegate noted Mr. Duncan's objections to the nature of the hearing and determined that it was appropriate for the dispute to be decided by the Branch adjudication process. She also found no unfairness in the fact that Mr. Duncan was representing himself by telephone.
22. The delegate determined that Ms. Jarrett was entitled to be paid wages for work performed, and concluded that there was no evidence to support Mr. Duncan's assertion that she was often late for work.
23. The delegate noted that Mr. Duncan did not maintain employer records as prescribed under section 28 of the *Act*. Consequently, the Employer had no record of Ms. Jarrett's daily hours of work. She noted that Mr. Duncan agreed that Ms. Jarrett's calendar of her hours of work was generally accurate. The delegate determined that Ms. Jarrett's evidence about her hours of work was more credible than Mr. Duncan's, finding Mr. Duncan to be evasive and argumentative. In view of the evidence before her, the delegate found it reasonable to accept Ms. Jarrett's evidence that she typically worked an additional 15 minutes each shift transporting supplies between restaurants. The delegate determined that Ms. Jarrett was entitled to an additional 26.67 hours of work.
24. The delegate also found that Ms. Jarrett was entitled to statutory holiday pay for Thanksgiving 2015.
25. Noting that an employer had the burden of showing just cause for dismissal to avoid liability for paying compensation for length of service, the delegate determined that Ms. Jarrett had not quit her employment. She also determined that Dad's had not discharged the burden of demonstrating that Ms. Jarrett had been dismissed for cause. The delegate found no evidence that Ms. Jarrett had been warned her employment was in jeopardy or that her conduct on February 2, 2016, constituted misconduct sufficient to warrant summary dismissal.
26. Noting that Ms. Jarrett completed her shift after the incident on February 3, 2016, the delegate also concluded that the employment relationship had not been repudiated.

Argument

27. Mr. Duncan says that after receiving the Determination, he informed the Branch that he would be appealing it and obtained and completed the necessary appeal documents. He said that he then became ill for several weeks, following which he became depressed due to the financial state of the business and lost track of the time in which to file the appeal.

28. In his appeal, Mr. Duncan recounted the background leading to the hearing, including some of his conversations with a Branch mediator. He says that while he was encouraged to settle to avoid the payment of “fines” should the matter proceed to a hearing, he refused to do so, believing that Ms. Jarrett was not entitled to any additional wages. Attached to the appeal submission is a letter from Andrea Watt, a bookkeeper with Wade and Company, who I understand does Dad’s bookkeeping. Ms. Watt wrote that, based on the information that she was given, Ms. Jarrett did not qualify for statutory holiday pay. Ms. Watt further indicated that Wade and Company did not receive any timesheets just bi-weekly total hours.
29. Also attached to the appeal submission were letters from two co-workers of Ms. Jarrett regarding their experiences working with her.
30. Mr. Duncan says that the hearing was held while he was at work and he felt it was unfair because he was not able to “confront his accuser” face-to-face.
31. In his appeal documents, Mr. Duncan repeats arguments made before the delegate; that Ms. Jarrett acted in a way that would cause her to get fired without quitting, and the second time she disrespected him, he had no choice but to let her go. He also repeats his argument that Ms. Jarrett was to report directly to him if she was unable to work.
32. Finally, Mr. Duncan contends that the fines are “extortion” and if required to pay, he will face bankruptcy.

ANALYSIS

33. Section 114 of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
- (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of Section 112(2) have not been met.
34. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
35. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision.

Timeliness

36. The appeal was filed over one month past the time frame in which to do so.
37. In *Niemisto* (BC EST # D099/96), the Tribunal set out the following criteria which an appellant had to meet in seeking an extension of time in which to file an appeal:
- a) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - b) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - c) the respondent party (i.e., the employer or employee), as well as the Director must have been aware of this intention;
 - d) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - e) there is a strong *prima facie* case in favour of the appellant.
38. These criteria are not exhaustive.
39. I find there is a both a genuine and on-going *bona fide* intention to file an appeal. I accept that Mr. Duncan did not like the Determination and took steps to appeal it, including obtaining and completing the requisite forms. He notified the Branch of his intentions.
40. I also accept that Mr. Duncan was busy running his business, with all the stress that normally entails. I am also prepared to accept, although Mr. Duncan provides no evidence, that Dad's is experiencing financial difficulties which may have caused some additional stress. Nevertheless, Mr. Duncan states that, after completing his appeal documents, he "lost track of time," thus causing him to file the appeal outside the statutory time period. I note that the appeal document is dated November 19, 2016, but was not submitted to the Tribunal until November 30, 2016. Mr. Duncan says that he was only prompted to file his appeal after the Bailiff appeared to enforce the Determination. Even if Mr. Duncan had submitted the appeal on November 19, 2016, he was nevertheless one month past the statutory deadline for doing so. I do not accept that "losing track of time" is a reasonable and credible explanation for failing to file the appeal within the statutory time period. Furthermore, I do not find that Dad's has demonstrated a strong *prima facie* case in its favour.
41. In *JC Creations Ltd.* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" to the appeal document: "The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned." As Dad's is self-represented, I have given it wide latitude in addressing the stated grounds of appeal.

Failure to observe the principles of natural justice

42. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that establishes that Dad's was denied natural justice. I infer from Mr. Duncan's submission that he objected to the fact the hearing was conducted by telephone.

43. Section 76(3) of the *Act* gives the Director the power to review, mediate, investigate or adjudicate complaints and the discretion to choose the manner in which the complaint is to be decided. The *Act* does not direct how an investigation or adjudication is to be conducted, provided that the Director gives the person under investigation an opportunity to respond (section 77 of the *Act*).
44. The decision of the Director about the complaint process is not per se open to challenge on natural justice grounds. Dad's was well aware of the allegations, as Ms. Jarrett completed a self-help kit and Mr. Duncan participated in a mediation.
45. In this case, the Director's delegate decided to adjudicate the complaint by telephone. Dad's was notified of the form of the hearing, as well as date and time by way of a letter dated March 22, 2016. Although Mr. Duncan expressed his displeasure with the fact that the hearing was being conducted by telephone, he did so only during the hearing. He did not object to either the form of hearing or the date or time of the hearing in advance. There is also no evidence he sought an adjournment to a time when it might have been more convenient to him.
46. The Branch has long conducted hearings by telephone, in keeping with the purposes of the *Act* as well as the realities respecting the administration of complaints. The purposes of the *Act* are to:
- (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,
 - (b) promote the fair treatment of employees and employers,
 - (c) encourage open communication between employers and employees
 - (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,
 - (e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and
 - (f) contribute in assisting employees to meet work and family responsibilities. (Section 2)
47. I find Dad's had the opportunity to respond to the allegations and there was no denial of natural justice. Furthermore, there is no suggestion, and no evidence, of any bias on the part of the decision maker.

Error of law

48. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
- 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 - 2. a misapplication of an applicable principle of general law;
 - 3. acting without any evidence;
 - 4. acting on a view of the facts which could not reasonably be entertained; and
 - 5. adopting a method of assessment which is wrong in principle.

49. The delegate considered the evidence of the parties regarding Ms. Jarrett's hours of work and found Ms. Jarrett's evidence to be more credible and persuasive. She also noted that Dad's had failed to maintain employer records as required by the *Act*. Credibility assessments are within the exclusive purview of the delegate. Furthermore, given that that Dad's failed to maintain a record of Ms. Jarrett's hours of work, I have no basis to interfere with the delegate's conclusions regarding Ms. Jarrett's wage entitlement.
50. The delegate evaluated the facts surrounding the end of Ms. Jarrett's employment in light of the test set out by the Tribunal in *Zoltan Kiss* (BC EST # D091/96) and concluded that Dad's had failed to discharge its burden of demonstrating that Ms. Jarrett quit her employment. In *Zoltan Kiss*, the Tribunal said:
- The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her further employment.
51. Ms. Jarrett did not say that she had quit, and worked an entire shift after the verbal altercation in the parking lot. I find no misapplication of the general principles of law.
52. Dad's also contends that the administrative penalty assessment is unfair.
53. Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed (section 98(1) of the *Act*). Penalty assessments are mandatory - there is no discretion as to whether the penalty ought to be imposed. Furthermore, the amount of the penalty is fixed by *Regulation* (section 29 of the *Regulation*).
54. As the Tribunal noted in *537370 B.C. Ltd. operating as Ponderosa Motor Inn* (BC EST # D011/06):
- Since the advent of the 2002 amendments, it has been argued in appeals which have come before the Tribunal that the imposition of a mandatory administrative penalty for each contravention of the *Act* can lead to unfair results, as for example in the not unusual situation where an employer is found to have contravened the *Act* in multiple ways, yet the source of those contraventions is but a single employee, and therefore but a single employment relationship. The perceived unfairness is augmented in situations such as the case before me on this appeal, where Ponderosa believed at all material times that the complainants were not, in fact, employees under the *Act* at all, but rather independent contractors.
55. While Dad's contends that the penalty assessment is unfair, the Tribunal cannot ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on its judgment about what is "fair" or "logical". (see *Douglas Mattson*, BC EST # RD647/01)
56. The Tribunal has also concluded that the *Act* provides for mandatory administrative penalties without any exceptions: "The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme." (see *Actton Super-Save Gas Stations Ltd.*, BC EST # D067/04)

New Evidence

57. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) 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;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) 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.
58. In support of the appeal, Dad's has included a letter from a bookkeeper and two co-workers of Ms. Jarrett. Although the letter from Ms. Watt is relevant to the appeal, I do not find that it would have led the delegate to a different conclusion on the issue of whether Ms. Jarrett was entitled to statutory holiday pay. As Ms. Watt notes, the records provided to her did not contain daily timesheets. As for the letters from the co-workers of Ms. Jarrett, this evidence was clearly available at the time Ms. Jarrett's complaint was adjudicated and ought to have been provided in advance of the hearing. This evidence does not meet the test for new evidence.

ORDER

59. Pursuant to section 114 of the *Act*, the appeal is dismissed. Not only has the appeal been filed well past the statutory time period, I am not persuaded that any grounds of appeal have been made out.
60. Pursuant to section 115 of the *Act*, I Order that the Determination, dated August 12, 2016, be confirmed in the amount of \$2,588.73, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal